INDEX

PAGE

Chronological Statement of Significant Dates 1b

Memorandum of Decision re Petition for Order No. 287 of the Reorganization Court, dated February 15, 1965 ..... 1c

Exhibits Introduced at the Inclusion Hearings before the Commission's Hearing Examiner, Commenced January 16, 1967

Exhibit NHI-1, Prepared Testimony of Richard Joyce Smith, Witness for the New Haven Trustees 19c

Exhibit NHI-5, Opinion of Sullivan & Cromwell 27c

Exhibit NHI-41, Prepared Testimony of William A. Gordon, Witness for the New Haven Trustees 47c

Exhibit NHI-42 [Exhibit to Mr. Gordon's Prepared Testimony, NHI-41] 49c

Exhibit NHI-44, Prepared Testimony of B. W. Thompson, Witness for the New Haven Trustees 54c

Exhibit NHI-51, Second Appraisal of the Harlem River and Oak Point Yards by Arthur J. McCann, for the New Haven Trustees 63c

Exhibit NHI-52, First Appraisal of the Oak Point Yard by Arthur J. McCann, for the New Haven Trustees 76c

Exhibit NHI-53, First Appraisal of the Harlem River Yards by Arthur J. McCann, for the New Haven Trustees 85c

PAGE

Exhibit NHI-55, Portion of First Appraisal by Arthur J. McCann of the Oak Point Yard, for the New Haven Trustees 92c

Exhibit NHI-58, Prepared Testimony of Frank A. Mason, Witness for the New Haven Trustees 104c

Exhibit NHI-62, Prepared Testimony of Ora C. Roehl, Witness for the New Haven Trustees 119c

Exhibit NHI-65, Prepared Testimony of William J. Kirk, Witness for the New Haven Trustees .. 143c

Exhibit NHI-87, Agreement between the New York Central and Hudson River Railroad Company, The New York, New Haven and Hartford Railroad Company, and New York and Harlem Railroad Company 151c

Exhibit NHI-92, Prepared Testimony of Norman J. Hull, Jr., Witness for Penn Central 181c

Exhibit NHI-93a, Amended Exhibit (NHI-93) to Prepared Testimony of Mr. Hull 186c

Exhibit NHI-94, Prepared Testimony of John R. White, Witness for Penn Central 189c

Exhibit NHI-95, Appraisal of James D. Landauer Associates of the Oak Point and Harlem River Yards 192c

Exhibit NHI-97, Prepared Testimony of Carl Veazie, Witness for Penn Central 196c

Exhibit NHI-99, Prepared Testimony of John W. Lane, Witness for Penn Central 199c

Exhibit NHI-107, Map of a Portion of the Oak Point Yard 202c

PAGE

Exhibit NHI-134, Prepared Rebuttal Testimony of John R. White, Witness for Penn Central 204c

Excerpts from Transcript of Hearings before the Commissioner's Examiner, Commenced January 16, 1967 ..... 206c

Cross-Examination of William A. Gordon 206c

Cross-Examination of Bradford W. Thompson 207c

Cross-Examination of Frank A. Mason 221c

Cross-Examination of William G. Kirk 227c

Extract from the Brief on Behalf of Manufacturers Hanover Trust Company, Filed With the Commission on June 5, 1967 ..... 231c

Extract from the Brief of the Chase Manhattan Bank, Filed with the Commission on June 5, 1967 ..... 233c

Extract from the Brief of The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee, Filed with the Commission on June 5, 1967 ..... 234c

Oral Argument before the Commission, June 15, 1967 ..... 235c

Exhibit Introduced at the Hearing on The New Haven Trustees' Plan of Reorganization before the Commission's Hearing Examiner Commencing November 3, 1967

Exhibit TPR-1, Prepared Testimony of William J. Kirk, Witness for the New Haven Trustees 241c

PAGE

Extract from the Memorandum of Plaintiff Manufacturers Hanover Trust Company, Filed in the United States District Court for the Southern District of New York, on or about March 15, 1968 ..... 250c

Report of John Van Voorhis, Special Master 253c

Supplemental Report of John Van Voorhis, Special Master 293c

Exhibits Introduced at the Remand Hearings before the Commission's Hearing Examiner, Commenced October 7, 1968

Exhibit R-1, Prepared Testimony of Richard Joyce Smith, a Witness for the New Haven Trustees 325c

Exhibit R-4, Income Statement Introduced by New Haven Trustee's Witness, John P. O'Sullivan 326c

Exhibit R-16, Prepared Rebuttal Testimony of Charles C. Shannon, a Witness for the New Haven Bondholders 328c

Exhibit R-19, Prepared Testimony of Lawrence S. Ritter, a Witness for the New Haven Bondholders 338c

Exhibit R-27, Prepared Testimony of Frederick E. Weaver, a Witness for Penn Central 341c

Exhibit R-29, Prepared Testimony of Robert E. Simon, Jr., a Witness for Penn Central 346c

Exhibit R-32, Prepared Testimony of Ralph E. Badger, Penn Central's Witness (Excluded—Rec. 381c) 351c

PAGE

Exhibit R-33, Prepared Testimony of Robert L. Schlesinger, Penn Central's Witness (Excluded—Rec. 381c) 352c

Exhibit R-38, Prepared Testimony of Norman J. Hull, a Witness for Penn Central 355c

Exhibit R-39, Prepared Testimony of Edward I. Altman, a Witness for the New Haven Bondholders 366c

Exhibit R-43, A Summary of Estimated Costs of Temporary Cessation of Operations With No Liquidation of Properties, Introduced by New Haven Trustees' Witness Smith 374c

Excerpts From Transcript of Hearings Before the Commission's Examiner, Commenced October 7, 1968 (The "Remand Hearings") 376c

Cross-Examination of Richard Joyce Smith, Witness for the New Haven Trustees 376c

Cross-Examination of Arthur J. McCann, Witness for the New Haven Trustees 382c

Cross-Examination of Frederick E. Weaver, Witness for Penn Central 396c

Examination of Charles C. Shannon, Witness for the New Haven Bondholders 404c

Examination of Dr. Edward I. Altman, Witness for the New Haven Bondholders 429c

Examination of Norman J. Hull, Witness for Penn Central 442c

PAGE

Cross-Examination of Robert E. Simon, Jr., Witness for Penn Central 446c

Letter from the Commission's Chairman to the Reorganization Court, dated June 10, 1969 ..... 499c

Letter from Counsel for the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission's Chairman, dated June 10, 1969 ..... 502c

Map of Southern Bronx Area furnished to the Three Judge Court by Counsel for Penn Central 511c

Chronological Statement of Significant Dates

July 7, 1961	The New Haven filed for reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut.
February 5, 1962	Commission Order authorizing Bondholders Committee to intervene in reorganization proceedings and to represent holders of New Haven's First and Refunding Mortgage Bonds.
March 9, 1962	Penn and Central jointly filed application with Commission for authority to merge.
June 19, 1962	Reorganization Court entered its Order No. 107 authorizing the New Haven Trustees to petition for inclusion in the Penn Central merger under Section 5(2)(d) of the Interstate Commerce Act.
June 26, 1962	New Haven Trustees filed petition for inclusion in merger of Penn and Central under Section 5(2) of the Interstate Commerce Act.
January 15, 1965	New Haven Trustees filed petition in the Reorganization Court requesting authority to apply to the Commission for authorization to discontinue all interstate passenger service.

Chronological Statement of Significant Dates

February 15, 1965	Reorganization Court entered its Order No. 287 authorizing Trustees to petition Commission for authority to discontinue all passenger service.
March 29, 1965	Hearing Examiners' Report and Order approving merger of Penn and Central providing for inclusion of New Haven's freight service but not its passenger service.
October 11, 1965	Trustees filed a notice of proposed discontinuance of all interstate passenger train operations effective March 1, 1966.
April 6, 1966	Commission published decision and order approving Penn Central merger on condition the New Haven's passenger and freight operations be included; Commission report and order denying The New Haven Trustees' application to discontinue long haul passenger service.
September 13, 1966	New Haven Trustees' petition filed in Reorganization Court for Order No. 404 authority to file with Commission a Reorganization Plan for inclusion of the New Haven in Penn Central through sale of assets.

Chronological Statement of Significant Dates

October 7, 1966	Answer of The Chase Manhattan Bank, N.A. in opposition to petition for Order No. 404.
October 10, 1966	Answer of Manufacturers Hanover Trust Company and Bondholders Committee to petition for Order No. 404; Answer of Bondholders' Committee in opposition to petition for Order No. 404.
October 24, 1966	Reorganization Court's memorandum of Decision and Order on petition for Order No. 404 authorizing filing of "First Step" of Two Step Plan with the Commission; Order No. 404 filed.
October 27, 1966	New Haven Trustees Penn and Central filed petition for approval of the Purchase Agreement under Section 5(2)(d) of the Interstate Commerce Act; New Haven Trustees also petitioned for approval of the Purchase Agreement as Step I of the New Haven's Plan of Reorganization.
November 9, 1966	Commission Order assigning matters in applications of Penn, Central, and The New Haven Trustees for hearings on a consolidated record starting January 16, 1967.
January 16, 1967 to May 12, 1967	Hearings before Commission's Examiner (the "Inclusion Hearings").

Chronological Statement of Significant Dates

April 6, 1967	New Haven Trustees' Petition for Order No. 441; Report of The New Haven Trustees on status of the reorganization and petition for instructions as to future course of action.
May 1, 1967	Answer of Bondholders' Committee to petition for Order No. 441; cross-petition for termination of reorganization proceedings.
June 15, 1967	Oral Argument before Commission.
July 11, 1967	"Partial Ruling" of Reorganization Court requesting Commission to require inclusion by lease simultaneously with merger.
August 1, 1967	Commission Order that Penn, Central and The New Haven Trustees negotiate and file within 30 days a lease to take over the New Haven during interim between merger and inclusion.
September 1, 1967	Penn and Central filed petition proposing a loan of $25,000,000 to the New Haven; The New Haven Trustees filed a similar petition with accompanying proposal that Penn Central absorb all interim operating losses.
September 12, 1967	Commission Order broadening scope of "interim" measures that Penn, Central, and The New Haven Trustees were to consider.

Chronological Statement of Significant Dates

September 25- September 27, 1967	Hearings on "interim relief" for the New Haven.
November 16, 1967	Commission's Second Supplemental Report and Order (the "Inclusion Report").
December 8, 1967	Application of Bondholders Committee for Assignment For Hearing of Cross-Petition of Bondholders Committee's cross-petition to terminate Reorganization Proceedings.
January 23, 1968	Bondholders filed petitions for review of the Inclusion Report in the United States District Court for the Southern District of New York.
January 31, 1968	Order of the Three Judge Court consolidating five actions for trial.
February 13, 1968	Memorandum of Decision of Reorganization Court on petition for Order No. 441 and cross-petition of bondholders dismissing bondholders' cross-petition for termination of Reorganization Proceedings.
February 20, 1968	Opinion of the Three Judge Court denying motion of the United States to dismiss.
March 29, 1968	Commission certified Plan of Reorganization to Reorganization Court as "First Step" of the Plan of Reorganization, pursuant to Bankruptcy Act §§77(d) and (e).

Chronological Statement of Significant Dates

April 8, 1968	Order of reference of Reorganization Court approving appointment of Hon. John Van Voorhis as Special Master.
May 2, 1968	Oral argument before Special Master.
May 6, 1968	Oral argument before Three Judge Court.
May 7, 8, 1968	Hearings before Special Master.
June 18, 1968	Special Master's Report on the New Haven's Interest in the Grand Central Terminal Properties.
July 8-13, 1968	Hearings before Special Master (resumed).
July 10, 1968	Opinion and Order of Three Judge Court Remanding Proceedings to Commission.
July 22, 1968	Special Master's Supplemental Report Filed.
August 5, 1968	Memorandum Opinion denying Penn Central's motion for reargument.
August 10, 1968	Decision dated August 10, 1968 on Reorganization Plan (relating to Remand Report); Order dated August 10, 1968 disapproving First Step of Reorganization Plan and remanding proceedings to Commission.

Chronological Statement of Significant Dates

September 9, 10, 1968	Appeals to Second Circuit from Reorganization Court Order dated August 10, 1968 filed by Appellants.
September 23, 1968	Appeals to Second Circuit from Reorganization Court Order dated August 10, 1968 filed by Appellants.
October 7-15, 1968	Remand Hearings before Commission's Examiners.
November 25, 1968	Commission's Fourth Supplemental Report and Order ("Remand Report").
December 2, 1968	Commission Certified Plan of Reorganization to Reorganization Court.
December 16, 1968	Objections to Plan of Reorganization filed.
December 20, 1968	Oral Argument before Reorganization Court on Inclusion of the New Haven in Penn Central on or before January 1, 1969.
December 24, 1968	Reorganization Court's Order No. 559 directing inclusion of the New Haven on December 31, 1968, and overruling Penn Central's objections.
December 27, 1968	Oral Opinion and Order of Three Judge Court denying Penn Central's motion to stay inclusion.
December 30, 1968	Manufacturers Hanover Trust Company's Petition to Review the Commission's Remand Report filed in

Chronological Statement of Significant Dates

	the United States District Court for the Southern District of New York.
January 23, 1969	Notice of Appeal to the Court of Appeals for the Second Circuit filed by Penn Central from Order No. 559 of the Reorganization Court.
May 28, 1969	Memorandum of Decision on issue of price to be paid for assets (relating to Commission's Remand Report) filed by Reorganization Court; Order No. 572 dated May 28, 1969 approving partial settlement with Penn Central under Purchase Agreement filed.
June 10, 1969	Letter of Commission to Reorganization Court re Discounts.
June 17, 1969	Letter of Bondholders' and Penn Central Counsel responding to Commission's June 10, 1969 letter.
June 18, 1969	Opinion of the Three Judge Court relating to the Remand Report.
June 27, 1969	Notice of Appeal to the Court of Appeals for the Second Circuit filed by Penn Central from Order No. 572.
July 1, 1969	Supplemental Order No. 572 filed fixing terms of final settlement between The New Haven Trustees and Penn Central under Purchase Agreement.

Chronological Statement of Significant Dates

July 10, 1969, as modified August 26, 1969	Commission's Fifth Supplemental Report and Order.
July 11, 1969	Notice of Appeal to the Court of Appeals for the Second Circuit filed by Penn Central from Supplemental Order No. 572.
July 23, 1969	Notice of Appeal to the Court of Appeals for the Second Circuit filed by Bondholders' Committee from Order No. 572.
July 28, 1969	Memorandum of Decision of the Reorganization Court on Step II portion of the Commission's Remand Report and Order; Order adjudging price to be paid by Penn Central and approving and disapproving certain Step II provisions of the Plan and Remand to Commission.
August 26, 1969	Notices of Appeal from July 28, 1969 filed by Penn Central, Manufacturers Hanover Trust Company, The Chase Manhattan Bank, N.A., and the Bondholders' Committee, to United States Court of Appeals for the Second Circuit.
September 11, 1969	Decree sustaining Remand Report; Memorandum of Decision on the decree.

Chronological Statement of Significant Dates

September 22, 1969	Notice of Appeal to the Court of Appeals for the Second Circuit filed by United States of America and the Commission.
October 7, 1969	Court of Appeals' Order consolidating appeals from Order dated August 10, 1968, Order No. 559, Order No. 572, Supplemental Order No. 572, and Order dated July 28, 1969.
October 9, 1969	Notices of Appeal to this Court filed by Manufacturers Hanover Trust Company, Chase Manhattan Bank, N.A., and the Bondholders' Committee.
December 5, 1969	Jurisdictional Statements and Petitions for Certiorari filed by Manufacturers Hanover Trust Company, Chase Manhattan Bank, N.A. and the Bondholders' Committee.
January 5-12, 1970	Cross-petitions for Certiorari filed by Penn Central, the United States and the Commission.
February 2, 1970	This Court grants Petitions for Certiorari before judgment in Nos. 914, 916, 920, 1038 and 1057, notes probable jurisdiction in Nos. 915, 917 and 921 and consolidates the cases for argument.

Reorganization Court Order #287

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 30226

MEMORANDUM OF DECISION RE PETITION FOR ORDER NO. 287.

The issue before the court is a narrow one. It is not called upon to decide on the merits of whether or not passenger service should, in fact, be discontinued. But in the course of giving recognition to the fact that it is faced with an extremely grave situation with regard to the debtor in reorganization, it is necessary that the court give thought to the contribution of the passenger service to the large operating losses of the Railroad and that the question of passenger service discontinuance be considered. Whether evidence will show that such discontinuance is necessary is a matter for decision by the appropriate commissions and agencies, primarily the Interstate Commerce Commission. The Trustees, who are better informed than anyone else on the subject, have considered and weighed all of the economic, social and legal aspects of the problem and have concluded that such a determination by the authorized commissions and agencies is, under the present circumstances, imperative and that they should apply for

it forthwith.[1] The only question now before this court is whether the best interests of the bankruptcy estate warrant the expenditures required for the purpose of making such application. The evidence in support of the petition is devastating and overwhelming. It stands completely uncontradicted. As the service is a losing one and as no reasonable prospects exist for arresting the losses, the Trustees should be allowed to proceed. Cf. *In re Fonda, Johnstown & Gloversville R. Co.*, 95 F.2d 397 (2d Cir. 1938). There is no doubt that the petition should be granted and it is so ordered.

While ordinarily this brief ruling would suffice, in view of the position taken at the hearing by the States of New York, Connecticut, Rhode Island and Massachusetts, the court will discuss the broader aspects of the problem.

The day of the hearing on this petition was the first time, during the more than three and one-half years of these court proceedings, that the states appeared and actively participated in the case. The primary thrust of their arguments was that all consideration of the discontinuance of the passenger service by any tribunal should be deferred. None of the states questioned the facts set forth in the petition, but it was suggested variously that the passenger problem was in the course of solution, that time was needed for legislative action, and that the Trustees had not come forward with proposals for them to consider.

The New York, New Haven and Hartford Railroad is historically the combination of the lines of about eighteen railroads some of which had, themselves, been combinations of still smaller lines. It grew up in response to economic demands of farms, mills, factories and other industries and of the travelling public at the end of the 19th century and the beginning of the 20th. At its peak in 1922-23 its main lines and branches had 2300 miles of track and its operation required over 38,000 employees. It was built

---

[1] In its extensive investigation of the New Haven's affairs the Interstate Commerce Commission specifically found that the New Haven's "passenger deficit is the primary cause of its current financial difficulties." 313 I.C.C. 411, 426 *aff'd* 314 I.C.C. 377 (1961).

from the savings and investment capital of hundreds of individuals and institutions and its earnings were such as to assure a reasonable return on the money put into it. At the present time the New Haven operates approximately 1600 miles of track and has less than 10,000 employees. It would be virtually impossible, for the purpose of operating it as a separate, independent railroad, to attract the investment of a single dollar of fresh capital for the obvious reason that there is no prospect of any return on the investment.

Although much has been said and many charges have been made about mismanagement, and although there are evidences in the years prior to the petition in bankruptcy that there had been, at least, serious errors of judgment, nevertheless, it is the opinion of the court that the major causes of the present plight of the New Haven Railroad lie in the operation of economic forces — principally competition. Many of the large textile mills and kinds of industries for which freight branches were built have closed down or moved away. In their places are industries with less demand for moving materials or merchandise in large bulk, so that other means of transportation are used. The New Haven's ratio of passenger service to freight is among the highest in the country. Like nearly all other railroads, millions of dollars have for many years been lost on passenger service operation — a loss customarily made up out of freight profits. This was true of the New Haven up to 1959. Thereafter the losses have been a burden falling solely on the creditors of the Railroad. A few months after the opening of the Connecticut Turnpike the New Haven began to show a serious loss in its freight revenues and it has never had an operating profit since. A train proceeding New York to Boston has truck competition on one side, sea borne competition on the other and air competition over head. All of these other forms of transportation directly or indirectly are subsidized by governmental assistance. Meanwhile the Railroad has to maintain its tracks, roadbed and other facilities and is heavily taxed in addition. The New Haven also suffers from the fact that it is a terminal railroad, that is, it ends at Boston, and its freight haul is very short. While the high per diem charge imposed upon the

New Haven, for every day the cars of another railroad are on its tracks, its profit on nearly half the freight cars bringing loads into the area are realized only on the incoming trip because nearly half go back empty. Thus the huge losses of the passenger services are uncompensated by profit on freight; there is no present prospect that it will be, and the necessity for a determination of the advisability of stopping the passenger service is immediate and acute. Moreover, as a railroad the New Haven has not been free to compete; it has been and still is shackled with statutory provisions, rules and regulations originally designed to curb railroads when they were too powerful monopolies and when such governmental restraint was required. Though the necessity for such curbs has been greatly reduced — particularly in the case of the New Haven — the laws and regulations remain substantially unchanged.

Although the demand for the freight and passenger services of the New Haven have declined, it has far from disappeared. Last year it carried 25,750,000 passengers and 19,300,000 tons, consisting of 583,441 carloadings of freight. So important is the freight service that the record of the case is replete with statistics and expert opinion that fully support the Trustees' conclusion that it is absolutely vital to the economy of southern New England; and it takes little imagination to envisage the inconvenience posed by the absence of passenger service, particularly in the case of the approximately 25,000 commuters who are daily carried into and out of New York City.

The New Haven is, therefore, a transportation enterprise created in an economic climate when the demand for its services assured a return for the investment capital which established and sustained it. That climate no longer exists. The demand is only a part of what it was; but it is still sufficiently substantial to be of major importance to the economy and to the welfare of thousands. The transportation plant has been shrunk measurably since its 1922-23 peak. There has been, since the petition in bankruptcy was filed, a strenuous belt-tightening, but the enormous increases in cost of operation far outstrip the savings which the rigid economies have achieved. It has to a great extent out-

lived the period when the high degree of its usefulness made it self-supporting, in spite of burdensome rules and regulations, and in spite of its terminal and short haul characteristics, but it is still so useful and necessary that the rest of the economy cannot afford to let it disappear, even though it cannot support itself. It, therefore, has become a problem for the governmental bodies to decide whether or not it is in the public interest to keep the New Haven going to meet present demands and to supply the continuous transfusion of financial blood to make up for operating losses, particularly in the passenger service, in the event that the freight service problem can be solved through merger with a trunk line, and to supply the fresh capital for the replacement of what has become obsolete.

In the evidence submitted at the hearing the following table of statistics was submitted, which shows with particularity much of what has been generally stated above:

	Net Railway Operating Income			*Net Income*
	Freight Income (millions)	*Passenger Income (millions)*	*Total* (millions)*	*(millions)*
1953	$ 23.3	$(13.4)	$ 9.9	$ 6.1
1954	19.4	(10.1)	9.2	9.1
1955	20.0	(14.2)	5.7	4.2
1956	17.4	(14.8)	2.5	.3
1957	15.6	(15.2)	.3	(2.4)
1958	7.1	(10.9)	(3.9)	(4.3)
1959	3.5	(12.6)	(9.2)	(10.8)
1960	(3.3)	(13.3)	(16.6)	(14.7)
1961	(7.2)	(12.3)	(19.6)	(19.5)
1962	(.6)	(10.9)	(11.5)	(12.7)
1963	(1.5)	(8.6)	(10.1)	(12.3)
1964	(5.9)	(11.8)	(17.7)	(17.1)

( ) Deficit

* Includes small amounts of unassigned expenses.

(Figures for 1964 are based on estimates, pending the compilation of final tabulations.)

As may be noted from this table, since these reorganization proceedings began, both the freight and passenger operations have continued to be unprofitable; the passenger service in particular has produced very substantial deficits. It has been possible for the Trustees to continue these services only by resorting to temporary expedients. Stringent internal economies made by the Trustees have not been enough and have had to be implemented by deferral of taxes and other current expenses, as well as postponement of considerable maintenance. In the face of declining revenues, however, these measures could not stem the tide indefinitely. Increased costs as the result of recent national labor awards and the need for maintenance which cannot be deferred threaten an imminent return to the substantial cash attrition which confronted the Trustees at the outset of their administration. Net wage increases, including fringe benefits, are estimated at $3,200,000 in 1964 and contributed to an estimated cash decrease of $2,500,000 during 1964. There remain cash obligations of an additional $1,700,000 on wage increases owed for 1964. Present estimates, assuming no other changes, are that the additional wage increases for 1965 and 1966 will total $4,800,000 and $6,000,000, respectively, for an aggregate, in the three years beginning January 1, 1964, of $14,000,000. Moreover, additional labor settlements announced last week indicate that there will be further increases in wages and that the Trustees' ability to reduce the labor force further will be seriously curtailed. These pay scales were agreed to by the railroads and the unions on a national level; they did not arise out of a locally made agreement. The New Haven is subject to them. It is not feasible to attempt to operate for a sustained period of time with substandard wages, but the New Haven cannot pay at the increased rate and also bear the heavy losses incurred in the passenger service without suffering a frightening acceleration in the loss of cash. This is not to say that the wage increases, although they have wiped out the gains made in the administration of the bankruptcy estate, are the sole cause of the crisis in the affairs of the New Haven. They have simply made it more immediately acute. The crisis preceded and brought about the bankruptcy. The major

contributing factor of passenger loss has existed throughout and at no time have the Trustees taken the position that there was any hope of reorganizing the New Haven Railroad as long as the passenger losses continued.

From their first report to this court and in subsequent reports, the Trustees have stressed both the necessity for a governmental underwriting of such passenger service as the public decides it wants, and the vital necessity of preserving adequate freight service for southern New England. They have, with this court's authorization, and through an enormous expenditure of time and effort, proceeded, and continue to press, by every available means to achieve the objective of merging the freight service in a trunk line system.

The figures showing passenger service losses were not questioned. They properly reflect a full allocation of costs, for to consider that these unprofitable operations can be continued on an out-of-pocket system of accounting is to ignore the basic premise that the law cannot indefinitely endure the confiscation of property without compensation. Those to whom is granted a public monopoly, compensatory in the main, can reasonably be expected to absorb the burdens of certain incidents of the monopoly. But no construction of due process will permit this court to require that the creditors of this estate witness the continuing erosion of their security without the slightest prospect of relief. It is important to underscore by quoting again what Judge Frank said in enunciating the law of this circuit in 1952:

> "As the debtor is a public utility, the judge properly took into account the factor of the public interest in the debtor's continued operations. That, however, is but one factor; it must not be allowed to outweigh all others. There are strict limits to the extent to which, in reorganization proceedings, the interests of creditors (or of a particular class of creditors) may be sacrificed to the public interest; to exceed those limits is (to say the least) to come dangerously close to the edge of unconstitutional taking of property, a line from which courts should keep away if possible."

In re Third Ave. Transit Corp., 198 F.2d 703, 707 (2d Cir. 1952).

Confronted with such uncontested evidence of losses, this court would be justified in requiring further delay on the part of the Trustees only if there were such prospect of relief from official sources, charged with protecting the public interest, that the proposed expenditure of the estate's funds appeared unnecessary. At the hearing, representatives of the four states served by the New Haven urged that the court defer granting the relief sought by the Trustees because the passenger service was so affected with a public interest that public authorities should be afforded more time to devise a solution which would permit the service to be continued.

Were this the first occasion at which the problem was defined, a plea for delay in measuring the prospects for relief would evoke different reactions. For three and a half years, however, the published reports of the Trustees and the repeated views of this court have stressed the urgency of the problem. This could have surprised only those who, for reasons best known to themselves, refused to hear.

The record shows that the public interest has been thus far supported by the creditors of this estate with no substantial participation from the states. Further, it has been stated on numerous occasions that the operation of unprofitable passenger service, however essential, at the expense of the creditors could only be temporary, as a matter of due process.

This court noted the problem in a Memorandum of Decision in October, 1961, in passing upon the application of the Trustees to issue further certificates. At that time, the question was presented whether the creditors' security should be impressed with a prior lien to secure the borrowings needed to continue the road in operation. In granting the application the court stated that:

> "The present reorganization is concerned not only with safeguarding the rights of [creditors] . . . , but it is also vitally

concerned with the public interest in preserving a transportation plant of major importance to the region in which it lies."

Filed in the record of that proceeding is an interim report of the Interstate Staff Committee addressed to its appointing authorities, the Governors of the States of New York, Connecticut, Massachusetts and Rhode Island, the County Executive of Westchester County, and the Mayor of the City of New York. That report took stock of economic realities in reminding the executives to whom it was made that a bankruptcy court might have to initiate steps for a "drastic curtailment in passenger service, particularly in commuter areas."

On that occasion, the public interest in maintaining a going concern was allowed to prevail. It was noted, however, that the court could not permit continuation of unprofitable operations beyond "a reasonable period for fact finding and judgment." In seeking to devise a workable plan of reorganization, it would ultimately be necessary that the Trustees move to "eliminate or exclude some services which the public may find necessary or desirable. If the states or local governmental bodies decide that such services should be continued then, they, directly or through an appropriate authority or agency, will contract with the Trustees for the requested operations and pay to the Railroad the full cost of them."

In March, 1962, the Trustees requested the court to advise them concerning the terms on which new, desperately needed equipment could be acquired for use in the west-end commutation service. Again, the court noted that this losing service was being operated only "to afford those who are guardians of the public interest, i.e. the executive and legislative officials concerned, to take the necessary steps to provide for a commuter service and eliminate the continuing loss to the debtor railroad." Ultimately, the continuation of the service would have to depend on the "extent and nature of the assistance provided by public authorities." Unless the public could come forward with a program

for assuming the losses of the service, the court could not justify granting the New York Port Authority a first lien on the estate to secure the Railroad's performance under a lease of cars.

In the light of these premises on which future commitments would be judged, the Trustees continued to negotiate for new equipment. In January, 1963, a second lease of new equipment was presented to this court in order to meet a deadline for continued tax relief in New York. Not only did the lease carry with it a commitment to continue the commutation service with equipment inadequate to the task, but there was again a total absence of any indication that direct financial assistance was being contemplated in any public quarter.

The year 1963 passed, the legislatures convened and closed, and no comprehensive program for public assistance had developed. The State of Connecticut did create the Connecticut Transportation Authority and did authorize it to expend limited sums to aid in maintaining desired railroad service in the state. While this was a good beginning, the funds appropriated were inadequate and, as a practical matter, their effective use depended upon joint action at least with the State of New York which failed to set up any corresponding machinery for aid.

In February, 1964, the court again stated that the passenger losses were being permitted solely to afford the states an opportunity to make a substantial contribution in areas where they wanted service continued. Concerned especially with the equipment crisis on the west end, the court asked the Trustees for a full report. This was prepared and filed in this proceeding, as a matter of public record. Report of Trustees on West End (New York City) Commuter Service (March 25, 1964).

In June, 1964, the State of New York, through the Port of New York Authority, indicated its willingness to lease sufficient equipment to the Trustees eventually to replace all the decrepit cars used in the west-end commutation service, and, in the interim, to refurbish the old cars pending manufacture of the new. The lease arrangement was similar to the prior unsuccessful ones,

in that the New Haven would have to pay substantial rentals, in this instance totalling $30,000,000, and would be committed to a long term operation of the service. However, it was also proposed that the municipalities in Westchester County and the Connecticut Transportation Authority enter into contracts with the Trustees to pay $850,000 a year for two years to help in defraying the rental payments under the lease. The court at the time made clear that this amount was a mere token and wholly inadequate to take care of the operating losses but said it would accept the arrangement if further aid could reasonably be expected.

However, even though the court approved the proposal as a first step in an aid program, New York was unable even to deliver the $400,000 contribution involved, let alone give assurance of continuing support, and so the project collapsed. It became clear that whatever aid would come from any source other than Connecticut would be given grudgingly, if at all, and, more significantly, that no commitments based on the expectation of assistance would be justified.

Requests for delay must accordingly be judged in the context of these developments which are certainly known to those who now urge postponement. Far from being indifferent to the public interest, the court has indulged that interest and allowed it to prevail over the creditors' rights for three and one-half years.

In spite of this long interval, very little has been produced. Massachusetts never fulfilled its commitment to grant tax relief. New York, by conditioning future tax relief on a commitment by the Trustees to lease new equipment and conduct commutation service at present levels with no assurance that the deficits would be underwritten, has used it as a lash over the back of the debtor to compel it to do the State's will at a time when it has not had the strength to do so. Tax relief in Connecticut and Rhode Island was continued, but with a requirement that certain standards of service be met and, accordingly, that the passenger deficits continue to be incurred.

If the public interest so urgently demands the continuance of the New Haven's passenger service, as the States seem suddenly to have discovered, they should have stopped taxing its property a long time ago. Commuters and other passengers demand better equipment and better service; the States insist upon imposing a continuing tax burden — everyone wants to draw the last ounces of blood out of this near corpse; but no one gives it the transfusion it so badly needs. It is now too late in the day to talk about saving the situation with tax relief. As the Railroad has not been able to use its vital cash for taxes, liens have been accumulating ahead of the creditors, forcing them further down the ladder of priorities, and accelerating and compelling the action which the court has taken today. If this tax burden continues to grow and the Railroad is not otherwise relieved, the creditors will be compelled to move for liquidation of the New Haven and the court will have no recourse but to order it. If the states wish essential passenger services continued, an underwriting which goes far beyond tax relief will be necessary.

In this respect, it is not the role of this court — or the function of the Trustees who act as an instrument of the court — to determine what particular services are most in the public interest and to allocate among the states and the federal government what their respective contributions should be. These decisions can only be made by those whom the people have chosen to represent their interests: the executive and legislative branches of the state and federal governments. These branches cannot delegate to the court or its officers the matter of determining what public resources should be withdrawn from other governmental purposes and devoted to the preservation of rail passenger service. The evidence presented at the hearing revealed that the Trustees met with the Governors of the four states at the outset of their administration and that they have continued to meet with and make information available to numerous public officials. The court expects the Trustees to continue to cooperate with any interested public authority in seeking passenger service solutions, but the court will not charge them with the duty of formulating plans which can

only properly be devised as an exercise of executive and legislative judgment.

To allow more delay would further invade the creditors' dwindling security and, because of a recent drastic worsening in the cash condition of the road, would frustrate the Trustees' attempts to preserve vital freight service in southern New England. The court must certainly reject the suggestion of the State of New York that the Trutsees resort to further borrowings to give the states more time to act.

In evaluating the prospects of public assistance, the court is aware of the proposal by Governors Rockefeller and Dempsey to furnish, at nominal rental, the needed new multiple-unit equipment for use in the west-end commutation service. The plan also calls for Connecticut and Westchester County to pay $800,000 per year in support of the service. If it can be implemented, the program, as the product of a long evolution described above, is unquestionably commendable as a means of replacing equipment — an objective which is consistent with the premises announced by this court from the outset of these proceedings.

It is still markedly inconsistent with those premises by continuing to refuse to regard the west-end commuter service as a part of the whole New Haven transportation system and by failing to face the fact that the commuter service losses, for the purpose of balancing creditor interest against public interest, must be weighed by the court on a fully allocated cost basis. Nor can the program be looked upon as ready life-preserver which will save the Railroad or even the passenger service, and thus present a reason why the granting of the Trustees' petition should be deferred. It calls for contributions of $5,000,000 from each of New York and Connecticut and $10,000,000 from the Federal Government. Neither governor has an appropriation or the authority to furnish such a sum from his own state, and without action by the states it is unlikely that assistance will be forthcoming from the Federal Government. Even motivated by the best of intentions, it presently amounts to no more than a suggestion which is incomplete and inadequate. Not a dollar of the

$20,000,000 is to be paid to the New Haven for operational cost. That sum would be used entirely by the New York Port Authority for the purchase of new cars to be loaned to the Railroad. This would only be helpful if provision were made fully to cover operating losses. As a token payment on account of such losses the Rockefeller-Dempsey plan proposes a contribution of $800,000 per year. This puts only a small dent in the annual operating losses for the west-end commuter service alone which will certainly reach a substantial number of millions of dollars for the present year, if continued. In the context of the operating losses of the entire passenger service of nearly $12,000,000 for 1964, not to mention the freight losses of nearly $6,000,000 more, and in view of the fact that the Trustees are faced with the necessity of meeting a *weekly* payroll of $1,200,000, a grant of cash of a little over $15,000 per week will certainly not suffice to save the Railroad from its ills. This would be as effective as attempting to remedy a broken back by dusting it with talcum powder.

Even though the governors' proposal is directed only at saving the west-end commuter service, it must be considered in the light of the other operations of the Railroad. As they also are suffering operating losses, they can contribute nothing to make up for the losses of the commuter operation and a proposal to save it must provide for the assumption of the substantial losses which the west-end commuter service incurs.

The court is therefore of the opinion that neither this program nor any other gives a sufficiently present and timely prospect of relief from the public authorities to justify the denial of this petition. It has been argued, in support of further delay, that relief may be forthcoming from private sources: that is, through the inclusion of the New Haven as sought by the Trustees in the proposed merger of two trunkline systems, the Pennsylvania Railroad and the New York Central Railroad. The record in these proceedings is to the contrary. In June 1962, the Trustees petitioned for leave to seek inclusion in the merged system in the proceedings before the Interstate Commerce Commission. At the hearing on their petition, the Trustees testified that they should

have preferred the merger issues to have arisen at a time when the New Haven was further along with its problems, especially the matter of public support of passenger service. The Pennsylvania and New York Central railroads are not in competition with the New Haven for passenger service, however; the Trustees' case for inclusion, as presented both to this court and the Interstate Commerce Commission, rests upon the impact which a merger would have on their freight operations. Their request for inclusion seeks to preserve the freight operations of the road which are so closely linked to the economy of southern New England. Inclusion in a trunk line system is not a harbor of refuge for each and every problem which contributed to the economic collapse of this railroad. It appears to the court that the Trustees have acted prudently in this regard. To have risked the denial of their petition in the merger proceedings by seeking the inclusion of passenger service would have been to jeopardize the future of freight service so vital to the economic health of this region.

There is, then, no reason to sanction any further deferral of steps designed to end these recurring and staggering passenger deficits when the problem and the procedure for its solution have existed for all to see for this length of time. The creditors have borne the onus of the public interest long enough; further delay would only prevent efforts to salvage anything, whether in freight or passenger service, as a going concern. Moreover, the appointed procedures under the Interstate Commerce Act will give public authorities, as a practical matter, sufficient time, with the Congress and the State Legislatures now in session, to take such action as the public interest warrants.

Dated at New Haven, Connecticut, this 15th day of February, A.D. 1965.

ROBERT P. ANDERSON
United States Circuit Judge
sitting by designation as
United States District Judge,
District of Connecticut.

Exhibit NHI-1

Prepared Testimony of Richard Joyce Smith, a Witness for the New Haven Trustees

* * * * *

—28—

Our next meeting with Penn and Central was on November 9, 1964. At the opening of that meeting, Mr. Saunders said that they had studied our letter of October 9 and disagreed with many of the comments in it. Mr. Saunders said at that time that they had arrived at certain conclusions based on the prior memoranda and discussions. Using consolidated book values rather than corporate book values, they were prepared to use the approach of the June 12 memorandum. Based upon this approach, and without adjustment, at the then current market value of 41 for Pennsylvania stock, they would pay $70 million for the New Haven in stock plus $7 million for accrued New Haven wages and vacation pay, less $25 million for labor severance and pension costs, or a net figure of $52 million. This offer, I point out, could be compared with their earlier suggestion of $41 million which, as I have previously indicated, they did not stress as a definitive offer. They said they would be willing to pay the $51 million on the basis of about 51% in stock and the balance in bonds. Specifically, they offered 635,000 shares of Penn-Central stock and $26,150,000 of Penn-Central bonds. We had a considerable discussion with them on the comparison of this offer with the liquidation value of the property. They said that they had made their

—29—

own analysis of the liquidating value of the New Haven and that they computed it to be about $128 million. They said that their offer, together with obligations on our equipment which they were assuming and other costs which they would be bearing, would produce a total cost to them of approxi-

mately $128 million to $129 million. We entered into considerable discussion of the detail of their offer and, in due course, left the meeting for private discussions. On resumption of the meeting, on behalf of the Trustees, I made the following counter-offer:

1. The price would be determined on relative consolidated book values.

2. A number of Penn-Central shares taken at their consolidated book value equal to 75% of New Haven's consolidated book value would be determined as of the closing date.

3. The shares so determined would then be taken at their market value.

4. The market value so determined would be paid ⅔ in Penn stock at its market value and ⅓ in Penn bonds.

5. The New Haven would receive cash equal to accrued wages and vacation pay.

6. New Haven would retain its current assets.

7. Penn-Central would assume New Haven's labor protection costs and pension costs and would assume such equipment obligations as it desired.

Our counter-offer was the subject then of considerable discussion and finally was flatly rejected by them on the

ground that the price was far too high. We then adjourned again for separate private discussions. Upon our second return to the meeting, I said that we would revise our proposal and would be willing to accept as a purchase price the following:

1. 865,000 shares of Penn-Central stock.

Exhibit NHI-1

2. $20 million in cash.

3. $20 million of bonds.

4. Assumption of our labor protection and pension costs. Under this proposal we said we would retain our current assets and we would be responsible for accrued wages and vacation pay.

Again there was considerable discussion and again we separated for private discussions. Upon resumption of the meeting, Mr. Saunders said that the last proposal was still too high and that it involved too much cash in view of their own problems. They then said that they would be willing to make another offer. He said that he wanted us to realize that, so far as they were concerned, the offer which he would outline would represent their top figure. His proposal was that they would pay the following:

1. 950,000 shares of Penn-Central stock.

2. $8 million cash.

3. $23 million of bonds.

4. New Haven's labor protection and pension costs. The Trustees, he said, could retain their current assets under this proposal and would have to pay their own accrued wages and vacation costs.

Again we separated for private discussions. In our own discussion, we gave consideration primarily to the anticipated value of the Penn-Central stock. It seemed to us that, although we could not arrive at any final valuation without a most detailed study, their proposal, together with our retained assets, could fairly well be considered to approximate what might be derived on a liquidation of the New

Haven, if it were assumed that a liquidation was, in fact, possible.

We had with us at this meeting Professor Moore, who is Court appointed counsel to the Trustees, and Mr. Auerbach, our special counsel for purposes of the inclusion proceeding and the author of the June 12 memorandum. We asked their views as to various aspects of the proposal. We considered with them the legal and time problems with which we were faced with respect to accomplishing an inclusion of the New Haven without an agreed consideration.

We finally considered whether we had to assume that Mr. Saunders' statement that they had made their top offer left any bargaining room. We concluded that the entire history of the negotiations warranted our assumption that Mr. Saunders' statement would properly be taken at face value. We were aware that there was a host of questions which would remain to be resolved even if we accepted the offer. We concluded, finally, that we would accept the offer. We then returned to the meeting, and I said to Mr. Saunders and Mr. Perlman that I was authorized by my fellow Trustees to state that the offer was accepted.

• • • • •

Exhibit NHI-1

APPENDIX A

DOUGLAS GIBBONS-HOLLYDAY & IVES, INC.
REAL ESTATE
745 FIFTH AVENUE
NEW YORK 22, N.Y.
—
PLAZA 3-5050

April 19, 1965

APPRAISAL OF RAILROAD PROPERTIES GRAND CENTRAL AREA

This appraisal is made of the present fair market value of the group of properties located in the Grand Central area listed on the index and the summary which follows. No allocation is made of the partial interests which may accrue to the New York Central Railroad or the New Haven Railroad. This is solely an appraisal of the whole value in each case. No appraisal is made either of the use by the railroads of portions of the underground areas in a number of these properties.

In arriving at these appraisals, consideration has been given to all proper factors including, among others, sales of other properties, ground leases on these and other comparable properties, income data where available, size and location of the properties and potential development. Details of the ground and property leases and income data were supplied by representatives of the New York New Haven & Hartford Railroad Company.

In the analysis of comparable leases and the relatively few sales possible of comparison, consideration has been

given to the complete change of character of Park Avenue from 46th Street north to 57th Street in the last 15 years. Prior to 1950, the improvements were almost all residential in character, with values adversely affected by residential rent controls. Now this area has been converted into one of the prime office building locations in New York. Leases and sales made before the transformation became assured must consequently be adjusted accordingly. At the same time consideration has been given to the economic conditions prevailing at the end of the period and the building boom inflationary trends generated to a considerable extent by this transformation of the area.

It is recognized that capitalization of ground leases does not necessarily indicate market value. In many cases a builder may agree to a rent higher than a fair return on value because capital investment in the land is not required and the investment risk is greatly reduced. However, lacking an adequate number of normal open market sales, leases must be evaluated as part of the considerations used by the appraiser.

These appraisals are based on a rate of return of 5% for the fees. Considering the prime location of these properties and the current money market this rate appears to be proper. Sales of the fees of three parcels, 399 Park Avenue, 400 Park and 405 Park Avenue all were at prices representing a capitalization of the ground rentals at 5%. Also, the majority of ground leases in the area provide for renewal with the rental fixed at 5% of value. The few

ground leases recently made which provide for a 6% return on renewals obviously reflect scarcity value and speculative activity. Because of the highly speculative

rental provided for in the Park Lane lease, a rate of 7% has been used to compensate for the risk.

In the consideration of all of these parcels subject to leases of varying numbers of years the effect of the lease terms on present value has been calculated and the appraisals of present market value reflect the resultant diminution or enhancement in value caused by these leases. Rentals for a fixed term of years and non-cancellable renewal options have been valued as annuities and the reversionary value of the land at the end of the term calculated. Where the ground rent is affected by income from the improvement or is a percentage of the whole, the proper rent has been calculated on land value and the balance attributed to the improvement. Because the percentage of land taxes paid by the tenants of these properties leaves a resultant profit or loss to the railroad landlord, this has been considered as an increased or decreased income to the fee owner.

With respect to the hotel properties no attempt has been made to allocate the income remaining after the proper return on the land, as between the hotel business and the rental value of the structure without the personal property required for the hotel business. This income has been arbitrarily capitalized at a rate of 10% to indicate the combined value of the structures and the hotel business.

These appraisals are made without regard to the relative interests involved in the ownership and the appraiser has no interest in these various ownerships.

/s/ DONALD MACDONALD
Donald MacDonald

DM:ev

Exhibit NHI-1

Based upon the factors set forth in the foregoing appraisal, we appraise the fair market value of these properties to be as follows:

SUMMARY OF APPRAISED VALUES

	Land Value if Free & Clear	*Land Value as Encumbered*	*Building*	*Total Appraisal*
51 East 42nd Street	$ 2,750,000	$ 2,750,000	$ 650,000	$ 3,400,000
Hotel Biltmore	9,000,000	9,000,000	13,500,000	22,500,000
Yale Club	1,600,000	1,150,000	—	1,150,000
52 Vanderbilt Avenue	1,600,000	1,600,000	1,150,000	2,750,000
200 Park Avenue	25,600,000	23,000,000	—	23,000,000
Hotel Commodore	13,000,000	13,000,000	11,000,000	24,000,000
Driveway-43rd & Lex. Ave.	1,350,000	1,300,000	—	1,300,000
Hotel Roosevelt	8,600,000	8,600,000	5,400,000	14,000,000
Vanderbilt Ave. Extension	1,080,000	625,000	—	625,000
379/83 Madison Ave.	8,700,000	5,550,000	800,000	6,350,000
250 Park Avenue	6,000,000	7,250,000	—	7,250,000
270 Park Avenue	18,000,000	8,000,000	—	8,000,000
290 Park Avenue	6,000,000	5,400,000	—	5,400,000
350 Park Avenue	3,600,000	3,500,000	—	3,500,000
245 Park Avenue	17,500,000	21,000,000	—	21,000,000
277 Park Avenue	17,500,000	18,500,000	—	18,500,000
299 Park Ave. (Park Lane)	9,600,000	12,000,000	—	12,000,000
Hotel Barclay	7,200,000	7,200,000	12,800,000	20,000,000
Waldorf Astoria	17,500,000	17,500,000	15,000,000	32,500,000
TOTALS	$176,180,000	$166,925,000	$ 60,300,000	$227,225,000

Exhibit NHI-5

Opinion of Sullivan & Cromwell
Submitted by the New Haven Trustees

July 16, 1964

Messrs. Richard Joyce Smith,
William J. Kirk and Harry W. Dorigan,
Trustees,
The New York, New Haven and
Hartford Railroad Company,
New Haven, Connecticut.

Dear Sirs:

You have asked our opinion on certain questions concerning the Trustees' rights in the Grand Central Terminal properties.

THE BASIC AGREEMENTS

An analysis of the relevant agreements, as interpreted by the courts in the Biltmore litigation, will shed considerable, although not conclusive, light on these problems.

The basic document defining the respective rights of the New Haven and the Central in the Terminal properties is an agreement between the New Haven, The New York Central and Hudson River Company (the predecessor of the Central) and The New York and Harlem Railroad Company, dated July 24, 1907 (the 1907 Agreement) as supplemented by the Agreement dated November 10, 1913 (the 1913 Agreement). It should be added, however, that there were prior agreements between the railroads which resulted

in some controversy which in turn led to an opinion of counsel concerning the rights of the New Haven and the

Central in the old depot; these documents are important background for the present problems.

The pertinent provisions of the 1907 Agreement are paragraphs 3, 4, 6, and 14.

Pursuant to paragraph 3, the Central "demised, let and leased . . . unto the New Haven Company, during the term of the New Haven Company's charter and renewals thereof . . . the use, in common with the Central Company . . . of the said Railroad Terminal for the accommodation of the traffic of the New Haven Company." "Railroad Terminal" as defined in the Agreement, and interpreted by the courts in the Biltmore litigation, includes all land, interests in land and improvements thereon in the Terminal area.

Under paragraph 4 of the 1907 Agreement, the New Haven is required to pay to the Central, as compensation for the use in common granted by paragraph 3, (i) a proportion of certain fixed charges, which payment in no event shall be less than $160,179.92 per year (paragraph 4-4e); (ii) a proportion of annual payments required to be paid to the City of New York and all insurance premiums and taxes and assessments upon the Railroad Terminal (paragraph 4(f)-(g)); and (iii) a proportion of all net costs of

maintenance, repairs and renewals of, and all net expenditures for, the operation of the Railroad Terminal, and certain costs incurred in connection with claims, actions and judgments (paragraph 4(h)-(j)).

Paragraph 4 further states that the New Haven's proportion of all these payments shall be determined by the number of New Haven cars and locomotives entering the Railroad Terminal in relation to those of the Central (the car-use ratio).

Paragraph 14 of the 1907 Agreement, which relates to the crediting of rentals from the Terminal properties to the

cost and expenses of the Terminal, provides that "all such rentals or other compensation so received, and not belonging exclusively to either Company, shall be credited to the fixed charges or to the cost of maintenance and operation of said Railroad Terminal, as the same may be applicable." These credits were made to an account known as the Terminal Account.

The credit provided by paragraph 14 reduces the costs and expenses of the Terminal and thus reduces the New Haven's obligations under paragraph 4. In effect then, the New Haven benefits from these rentals in proportion to the car-use ratio for the period in question.

—4—

Under paragraph 6 of the 1907 Agreement,

> "The New Haven Company hereby covenants and agrees with the Central Company not to assign this lease or any interest therein, or any interest in or to the use of the said Railroad Terminal hereby demised, or to underlet the same or any part thereof without the previous written consent of the Central Company, and also not to use or occupy any part of the demised premises or privileges or permit the same to be used or occupied for any purpose other than those for which the same are herein stated to be demised;"

This paragraph further gives the right to the Central, in the event of a default by the New Haven "of any of the covenants and agreements herein contained", to declare the term void and to enter and repossess the premises.

Thereafter the New Haven and the Central entered into the 1913 Agreement "to express more fully" the rights of the parties "with respect to the construction, maintenance and use of" buildings constructed in the Terminal area and

"with respect to the rentals accruing from the leasing of such buildings and portions thereof." The most important feature of the 1913 Agreement was to make clear that the New Haven had the right "to join with the Central Company in accordance with agreements relating thereto, made, or from time to time to be made, . . . in the construction, holding, maintenance and leasing of buildings, or parts thereof . . . upon the land included within the Railroad

Terminal". The portion of the 1913 Agreement relating to the allocation of rentals provides that:

> "In all cases in which the New Haven Company and the Central Company shall join in the construction of any such building or buildings, the rentals to be credited to the fixed charges or to the cost of maintenance and operation of the Railroad Terminal under the provisions of Paragraph 14 of this agreement shall include all rentals accruing from the leases of the buildings or parts of buildings so constructed, except such rentals as by agreement between the New Haven Company and the Central Company shall be paid over to the New Haven Company and the Central Company or either of them as a proper return for the moneys advanced by such party to provide for the construction of any said buildings."

Several hundred agreements relating to the leasing and financing of, and sharing of rentals from the buildings constructed in the Terminal area were made pursuant to the basic 1907 and 1913 Agreements.

A few general characteristics of these agreements are worthy of note:

(a) Generally, the Central and the New Haven participated on an equal basis in the financing of the build-

ings within the Terminal area—either directly or indirectly—and the two Railroads shared on an equal basis the rentals from the buildings until their advances were reimbursed with interest.

(b) After reimbursement of advances with interest, the agreements provided that rentals were to be cred-

—6—

ited to the cost of maintenance and operation of the Railroad Terminal, or in the case of some buildings, to the cost of maintenance and operation or to fixed charges. As noted above, these credits were made to the Terminal Account.

THE BILTMORE LITIGATION

Although the various problems you raise were not put directly in issue in the Biltmore litigation, the interpretation of the basic agreements will be binding on the New Haven and the Central and will then be of great importance in any subsequent controversy or litigation involving these problems.

The final judgment in that case provided, among other things, that the New Haven has the right to join with the Central in the construction, holding, maintenance and leasing of any building or improvement in or on the Biltmore premises; that the New Haven has a right to have an equal voice with the Central in the execution of any instrument or lease or other contract pertaining to the Biltmore premises; that the Central may not without the consent and approval of the New Haven erect on or above the surface of the Biltmore premises any building, structure or im-

—7—

provement; that the New Haven has the right to share in all rentals and compensation accruing from the Biltmore

Exhibit NHI-5

premises; and that the Central is the owner in fee simple of the Biltmore premises, subject to the rights of the New Haven granted by the Terminal Agreements.

While the immediate issue in the Biltmore case related to the Biltmore premises, the underlying question in the case related to the broader question of the rights of the railroads in the Terminal properties, and the opinion of the Appellate Division accordingly addressed itself to the more basic question.

The following passages from the decision by the Appellate Division, First Department* are important in terms of the significance of the case from the standpoint of the over-all Terminal.

> "It is apparent, therefore, that the parties did not come to the conference table in 1913 to establish new rights but rather—as stated in the 1913 preamble—to define rights already established and already acted upon. And they came to the conference table on equal terms despite the fact that Central was the owner of the fee. Its ownership had already been encumbered—encumbered by the rights of New Haven to use the Terminal land 'in common' with Central. Moreover, whatever advantage Central claims by reason of being the owner of the fee was neutralized by the obligation of New Haven to pay to Central and Central to receive 4¼% of its actual net expenditures in acquiring the land and for the construction of the Railroad Terminal. And in consequence, provision was made for a ground rent to be paid, not to Central alone, but for the benefit of New Haven as well, through the medium of the

Terminal Account. Ordinarily the ground rent is paid

* Affirmed without opinion by the Court of Appeals.

only to the owner of a fee or one who has an interest in the fee. Incidentally, that ground rent is still being credited to that account to the advantage not only of Central but of New Haven.

"The actual underlying fee of the land upon which this great Railroad Terminal was laid out is largely a matter of only historic importance, since it is clear that it became dedicated by the fee owner to the railroad passenger terminal usages of both railroads, and all of its structures and facilities were incidental to those usages, or were created to provide income to maintain those usages. No such importance attaches to rights of the party who owns the underlying fee as might be expected in the usual leasing or licensing of land; and what is of greater importance on the intention of both parties, they had already fixed their rights in the terminal area land and in its development as being equal rights before they undertook the construction of the Biltmore or other structures or facilities incidental to the terminal passenger operation. They had, in effect, converted themselves into owners of the fee together, as far as the area of this controversy stretches.

"It is clear that the development of the lands over the tracts was but another step in the joint exploitation of the Railroad properties made possible by the covering of the tracks. It was an incident in the development of the Railroad Terminal in which each party had a joint interest—that of Central as owner of the fee and that of New Haven by virtue of its rights which, for good consideration, were carved out of the fee." . . .

"I believe that a more accurate description of New Haven's position, if we wish to consider it in corporate terms, would be that of one holding stock in an amount

sufficient to give it equality in control. A still better description of New Haven's position would be that of a partner."

—9—

I

The first major question you have asked is whether the New Haven's rights and obligations in the Terminal under the Terminal Agreements are completely dependent upon the New Haven's entrances into the Terminal and how those rights and obligations would be affected by a reduction or discontinuance of entrances.

As we shall hereafter state, we believe that it can fairly be argued that the 1913 Agreement, although cast in the form of a mere addition of words to paragraph 3 of the 1907 Agreement, established a new business relationship between the New Haven and the Central relating to the real estate venture undertaken, which was not of a railroad character or necessarily governed in all respects by provisions of the 1907 Agreement relating to the railroad relationship between the parties, although the 1907 Agreement itself was framed and phrased entirely in connection with and contemplation of a railroad relationship. It is arguable from this premise* that the existence and continuation of the relationship between the railroads in respect to their real estate venture is not dependent upon

—10—

the 1907 Agreement's implicit requirement that the New

---

* Another significant consequence to the benefit of the New Haven that could flow from such a view of the 1913 Agreement is discussed below with respect to the rights of the railroads in a possible excess in the Terminal Account.

Haven use the Terminal as a condition of having rights in the Terminal.*

We believe, however, that the entire sense of the 1907 Agreement, to which the 1913 Agreement is an addendum, contemplates a railroad use of the Terminal by the New Haven and that discontinuance of entrances into the Terminal by the New Haven would terminate the 1907 Agreement and the 1913 Agreement as well, except as to the right of the New Haven to be reimbursed for any unpaid building advances. We do not purport to carry this opinion further than the Agreements mentioned, however, or consider now the effect of a discontinuance of entrances upon other agreements between the railroads.

We do not see that a reduction, even a sharp reduction, in entrances would affect the rights and obligations of the railroads in respect to Terminal costs except as such consequences of relative use are provided for in the 1907 Agreement. If the New Haven entrances became merely nominal, then the New Haven might open itself up to the successful argument by the Central that a merely nominal use is the equivalent of abandonment.

—11—

You have raised the related question of supposing that car entrances were discontinued for a period of time, but then revised. The consequences of discontinuance and whether they could be affected by an attempted revival of use would depend upon the circumstances of the dis-

* We speak of this requirement as being "implicit," because it is nowhere expressly stated that the New Haven's standing in the Terminal or that the Terminal Agreement itself would terminate on a cessation of use of the Terminal by the New Haven, but it is implicit from the fact that all of the provisions of the Agreement as to rights and obligations are related to and based upon the assumption of use.

continuance. If the discontinuance was of a brief duration for a compelling cause of an obviously temporary nature, so that a return to use of the Terminal in a reasonable time would be clearly contemplated, we would think that a forfeiture could not be exacted from such a temporary suspension of entrances. If, however, the discontinuance of entrances was deliberate, taken for an indefinite or considerable period, it would likely be considered an abandonment of the use of the Terminal, not subject to revival. In short, the facts and circumstances would be controlling, and we can hardly say more on that subject at this time.

In this connection you have also raised the question of what would happen to the New Haven's obligations to make payments under the Agreement if the New Haven were to reduce its car entries to a nominal figure or to zero. If they were reduced to a nominal figure it would seem that the car-use ratio would continue to govern subject to the minimum fixed payment called for in subparagraph (e) of paragraph 4 of the 1907 Agreement. If there was an

abandonment or a reduction of car use to a point where an abandonment would be implied, then the 1907 Agreement would still impose an obligation on the part of the New Haven to continue to make the fixed payment under subparagraph (e) of paragraph 4, until such time as the Central declared a forfeiture and repossessed the premises.

II

The second major question which you raise is as to the rights of the New Haven in a possible credit balance in the Terminal account due to favorable developments in the real estate venture.

Exhibit NHI-5

In our opinion, the Central is not entitled to take the entire excess of such credit balance. The decision of the Appellate Division, affirmed by the Court of Appeals, in the Biltmore litigation, tends strongly to refute any such contention that might be advanced by the Central. The judgment and the opinion of the Appellate Division establish that the New Haven has a use in common with the Central in the Railroad Terminal and all land and improvements thereon; that the New Haven's rights to use this area and join in its development are equal with those of the Central; that the underlying fee is largely a matter of only historic importance with no importance attaching to it as

might be expected in the usual leasing of land; and that the two Railroads are partners in the development of the Terminal area.

The disposition of the excess which is suggested as a first impression, from a consideration of the problem in the light of the 1907 Agreement, is a distribution in accordance with car-use ratios. Such a distribution would, in our opinion, be the most likely determination by a court decision or arbitration.

We believe that a substantial and forceful argument can be made that the excess which is due entirely to a real estate venture, with no relation to railroad operations, should be divided between the parties on the basis of their investment in the buildings, namely 50-50. This argument would be premised on the separateness of the real estate venture in both the time and nature of the undertaking, although supplemental to the railroad operation of the Terminal, and the different means of financing the buildings through equal contributions by the two railroads. A factor which must be acknowledged as mitigating against the argument for

equality of interest in any credit balance accruing from the real estate venture, however, is the fact that the real estate income is not derived entirely or even primarily from the buildings, but is derived largely or principally as a "ground

—14—

rental" from the use of the land, toward the cost of which the New Haven has not made an equal contribution.

In assessing this argument, due consideration must be given to the importance that might be attached to the use of the word "cost" in paragraph 14 of the 1907 Agreement, providing for crediting of rentals to the fixed charges or to the "cost of maintenance and operation" of the Terminal.

A persuasive argument, in our opinion, built around the use of the word "cost", would be that distribution of any excess in the Terminal Account should be governed correspondingly by the provision of the 1907 Agreement relating to the contributions of the railroads to the "cost" of maintenance and operation of the Terminal, namely, the car-use ratio.

We believe it is fair to argue, however, that there is no magic in the use of the word "cost", particularly if a point is reached when cost ceases to be a controlling factor and we are talking about a credit balance. If the word "cost" is then ignored as meaningless and the paragraph in this respect is read as providing simply for a credit to the "maintenance and operation" of the Terminal, and the real estate undertaking is considered an "operation" of the Terminal, it can fairly be argued that any credit balance is subject to mutual agreement in accordance with the equal

—15—

voice which the two railroads have in the operation of the Terminal, and on failure of agreement a division of any balance should be made between the railroads equally in

accordance with their equal voice in the operation of the buildings. The caveat made above should be repeated, however, even ignoring the word "cost" and its possible significance, that the argument in favor of an equal division of a credit balance on the basis of equality of voice in the buildings is weakened by the basic source of the real estate venture in the land or underlying fee.

III

The third major question you raise is whether and to what extent the New Haven has an interest—legal or equitable—in the fee. We have purposely and successfully avoided throughout the recent litigation asserting any position or responding to any question as to the nature of the New Haven's interest in the Terminal in the terms of a traditional real estate classification. The opinion of the Appellate Division affirmed by the Court of Appeals has gone as far as we could ask in characterizing the relationship of the two railroads as "partners" and in saying that "They had, in effect, converted themselves into owners of the fee together, as far as the area of this controversy stretches."

—16—

We would hesitate to put the New Haven's position forward as being based on an interest in the fee. We have not heretofore found it necessary to define the New Haven's interest in the Terminal in this way and would not anticipate the necessity of doing so.

Questions relating to the New Haven's interest in the fee are all equally answerable without attempting to define the rights of the New Haven in the terms of an interest in the fee. The requirement, such as it be, of the New Haven's using the Terminal as a basis for holding any

rights, the significance of car entrances, and the limitations on the assignment of the New Haven's rights, are covered by the Agreements.

Likewise, it seems to us that it is not necessary to attempt to express the New Haven's interest in the Terminal as an "interest in the fee" to go about arriving at a valuation of its position in the Terminal for the purpose of its participation in a Penn-Central merger or otherwise. Whatever the ultimate legal characterization of the New Haven's interest in the Terminal area may be—and we think it may be fairly said to be unique, arising as it does from the relationship and conduct of the parties over many years and hundreds of documents in addition to the

1907 and the 1913 Agreements, the legal interest owned by the New Haven is only a single element in arriving at a valuation of the total interest of the New Haven in the Terminal properties. Many other factors primarily economic in character would have to be taken into account, and such factors would in large part be dependent upon opinions and judgments not within our province or competence.

Nor is it necessary to express the New Haven's interest as an "interest in the fee" in order to conclude, as we do, that the Central could not either practically or legally sell any of the Terminal properties without the active concurrence of the New Haven. We think it is clear that from all that has been noted it follows that the New Haven's consent would be required in the event of a sale of the Terminal properties and consequently its agreement in the disposition of the proceeds of any such sale. It should be noted in connection with sales which have been made that the New Haven did not fare even as well in the disposition

of the proceeds as the car-use ratio, but there appears to be no reason why it could not reasonably insist that on a future sale its rights to the proceeds be recognized, at least to the extent of the car-use ratio.

—18—

IV

We finally consider questions relating to the rights of the New Haven to keep and incorporate its interest in the Terminal in various types of reorganization of the railroad. While related to limitations on the right of assignment, the questions you put are not automatically answered by the express assignment terms. Therefore, we go somewhat further in responding to what we believe you visualize as problems and possibilities.

In our opinion the New Haven could not alienate its interest by sale, mortgage or otherwise without the consent of the Central. Nor could its interest be spun off to a separately created corporation without such consent.

The "demise" to the New Haven by the 1907 Agreement includes in its term not only the term of the New Haven's charter but also "including the charter of any company which shall operate the present railroad of the said New Haven Company". The New Haven, therefore, can have a successor company which would take its rights. Reorganization of the company itself would present no problem. The questions you put relate more pointedly, therefore, to a possible merger outside of a merger with the Central. The question is, does the covenant "not to assign this lease

—19—

or any interest therein" bar absorption of the New Haven's interest into a company which includes the New Haven but is more than the New Haven?

The covenant does not specifically bar such an absorption by merger or consolidation. This does not mean, however, as the following discussion will indicate, that the covenant against assignment would not operate against the interest of the New Haven in the Terminal falling into certain hands by merger, particularly into a merger including a competitor of the Central.

Courts have held that a sale of assets by one corporation to another corporation will constitute a violation of a covenant against assignment in a lease transferred along with the other assets, but that the purchase by one corporation of all or part of the stock of another corporation is not such a violation, assuming the continued vitality of the lessee-corporation as a separate functioning entity.

There is a paucity of case authority as to whether a statutory merger constitutes a breach of a covenant against assignment contained in a lease. In *Dodier Realty & Investment Co.* v. *St. Louis National Baseball Club, Inc.*, 361 Mo. 981, 238 S.W.2d 321 (1951), the Supreme Court of Missouri held that a statutory merger of a lessee-corporation into another corporation did not violate such a cove-

nant. The Court reasoned that, although the merger was entered into voluntarily, the transfer of the lease actually occurred, not because of these voluntary acts, but by virtue of the Missouri General Business and Corporation Act, the statute under which the merger was effectuated. In so holding, the Court relied on the well-established principle of law that a covenant against assignment, in the absence of specific language to the contrary, will be construed to prohibit only voluntary assignments and not assignments by operation of law.

The Missouri Court also relied upon a United States Supreme Court decision, *United States* v. *Seattle-First*

National Bank, 321 U.S. 583 (1944), in which it was held that a consolidation voluntarily entered into by two companies, but effectuated under the National Bank Act, rendered a transfer of certain securities held by one of the corporations a transfer "wholly by operation of law" and thus within a statutory exemption from a tax on voluntary transfers of securities.

There are a number of decisions in other contexts holding that statutory mergers transfer the assets of the merged corporation by operation of law.

—21—

It should be noted, however, that in *Feeley* v. *Harwood Electric Co.*, 22 Luzerne Leg. Reg. Rep. 314 (Luzerne County, Pa., 1923), the Court held that a statutory merger resulted in an assignment in violation of a covenant prohibiting assignments. The Court reasoned that there is no difference between a "statutory transfer effected by merger and any other mode of transfer through the voluntary act of the lessee. . .".*

Although we believe that most courts would adopt the reasoning of the Missouri Court in a case involving an ordinary lease, we note that there are two significant aspects of the 1907 Agreement which distinguish it from ordinary leases. This agreement, as is made clear by the Biltmore litigation, is much more than a mere lease; it constituted the parties as partners in a joint venture, each sharing equality of control over the development of the Terminal

---

* The covenant in this case was broader than that involved in the *Dodier* case or in the 1907 Agreement; it prohibited "not only the voluntary action of the lessee, but also every levy or execution or other legal process and every act of bankruptcy or every assignment of sale in bankruptcy, insolvency, or under any other compulsory procedure or order of court."

Exhibit NHI-5

area. Because it is generally recognized that a partner's interest in the partnership cannot be assigned without the consent of the other partners, there is a real possibility that a court, invoking this rule of partnership law by analogy,

—22—

would more strictly apply the covenant against assignment than it would in a case involving an ordinary lease.

A further difference between the 1907 Agreement and an ordinary lease is the covenant contained in paragraph 20 that neither of the parties will assign the contract or any interest thereunder to a railroad company which may be a rival or competitor to the other party. The usual covenant against assignment serves no purpose other than preserving to the lessor his right to choose his tenant. The covenant contained in paragraph 20, however, embodies the very practical and probably more important consideration that one should not have foisted upon him a partner not of his own choosing who also happens to be a competitor.

Paragraph 20 of the 1907 Agreement thus bears directly on the question you ask in reference to the New Haven's possibly merging with other railroads. A necessary consideration would have to be whether such other railroad is a competitor of the Central.

Our discussion so far has related to the right of the railroads to assign their respective interests under the 1907 and 1913 Agreements. The New Haven's rights under the Agreements, however, are presently part of the property within the exclusive jurisdiction of the Reorganization Court and the Trustees, and for this reason the enforce-

—23—

ability of the covenants against assignment as against the Trustees may well be governed by the Bankruptcy Act.

Exhibit NHI-5

We refer specifically to Section 70b of the Bankruptcy Act, which states that:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

The United States Supreme Court has held this section applicable in railroad reorganization proceedings under Section 77 of the Bankruptcy Act. *Smith* v. *Hoboken R.R. Wholesale & S.S. Connecting Co.*, 328 U.S. 123 (1946).

We also note the broad powers given the Reorganization Court pursuant to Paragraph 77(f) of the Bankruptcy Act:

> "The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustees of any obligation of the

> debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require

the debtor to join in any such transfer or conveyance made by the trustee or trustees."

It is certainly arguable that this provision gives the Reorganization Court authority to require the Central to give its consent to any provision in the reorganization plan, such as merger with another railroad, which has the effect of transferring the New Haven's rights under the 1907 and 1913 Agreements.

As a persuasive countervailing consideration to the contention that the Trustees under Section 70(b) of the Bankruptcy Act or the Reorganization Court under Section 77(f) of this Act, could effectuate such a transfer, we refer to our discussion above concerning the partnership relationship of the parties created by the 1907 and 1913 Agreements. Again we note that, because of this relationship, a court might well hesitate in sanctioning any assignment, even pursuant to the Bankruptcy Act, of the New Haven's interests in the Terminal area without the Central's consent.

We trust that we have sufficiently covered the questions you have asked and given the advice you seek. If you should

wish anything further from us or should wish to discuss any aspects of the matter with us we would be glad to respond or meet with you.

Very truly yours,

SULLIVAN & CROMWELL

Exhibit NHI-41

Prepared Testimony of William A. Gordon
a Witness for the New Haven Trustees

* * * * *

—13—

Although attempts undoubtedly would be made to offset such revenue losses by reductions in expenses such attempts would not succeed so long as the railroad had to continue operations. In connection with the 1964 study, the New Haven's staff estimated that even an advance notice as short as thirty days would cause an estimated revenue loss of $2,250,000 and an estimated reduction in expenses of $950,000, or a net loss of $1,300,000. Any longer notice period would certainly have the effect of increasing the drain on the estate prior to the elimination of service.

Previously I noted certain principal areas of difference between the present liquidation study and the study prepared in 1964. I would like to bring to the Commission's attention two additional such areas. One of these relates to Special Deposits. In the first study this category had an estimated value on liquidation of $6,068,000, while in the present study the comparable figure is $13,199,000. A significant reason for the increase in this category is the deposit of $4,500,000 in proceeds from additional Trustees' certificates issued subsequent to the effective date of the earlier study. The second item which should be particularly noted is Account *712,* Material and Supplies. In the prior study, book value of $4,916,000 was used to estimate liquidation value. In the present study a detailed analysis was made resulting in an estimated liquidation value of $2,083,000.

I wish to emphasize that the estimate of net liquidation value reflected by my exhibit must be recognized as con-

Exhibit NHI-41

servatively high since it is based upon an admittedly optimistic assumption that the entire task of liquidation could be fully accomplished in a six year period. For this reason I have considered, with the assistance of appropriate officials of the Railroad, the question of what might be the net liquidation value of the Railroad's assets assuming a longer

period for disposal. In this regard, Mr. Thompson prepared for me his estimate of the net liquidation value of the real estate properties using a ten-year disposal period and the method of estimating real estate disposal costs used in the prior study. He applied such methods to the current estimate of fair market value of $113,700,000 rather than the 1964 study figure of $95,000,000. On that basis, Mr. Thompson has advised me that real estate liquidation costs over a ten-year period would aggregate $39,937,125 before reflecting unpaid taxes and interest through December 31, 1965. As previously noted, these amount to $17,449,145. The resulting real estate liquidation costs under an assumed ten-year disposal period would be $57,386,270. After including the additional costs that would be incurred by other departments in a ten-year disposal as compared with a six-year disposal the estimated net liquidation value of the Railroad's assets is $153,443,000.

Thus, analyzing the Railroad's assets under assumed liquidation periods of six years and ten years produces an estimated net liquidation value from $153,443,000 to $170,810,000.

Exhibit NHI-42

Estimated Liquidation Value of Assets of New Haven Railroad as of December 31, 1965

[Exhibit to Prepared Testimony of Mr. Gordon, Exhibit NHI-41]

• • • • • •

—9—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY BASES FOR VALUATION OF INVESTMENTS AS OF DECEMBER 31, 1965

Reference No.	

• • • • • •

4. New York Connecting's funded debt totals $17,995,000 compared with depreciated book value of the property of $20,464,357. Since approximately 14 million dollars of this amount represents investment in bridges, engineering, etc. there remains slightly less than six and a half million dollars of property which would have some salvageable value. Obviously the stock has no value.

• • • • • •

6. Since Greyhound Corporation's offer of twenty dollars a share for REA stock is in litigation and since recent legislation increasing the allowable size and weight of parcel post packages will probably have a detrimental effect on REA's earnings, it is believed that the stock owned by the New Haven has little if any liquidating value.

With respect to the promissory note, however, we have valued it at par of $1,272,284, under the assumption that REA will continue to operate.

• • • • • •

Exhibit NHI-42

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ESTIMATED LIQUIDATION VALUE OF PROPERTIES

(Accounts 731 to 738, excluding Leased Lines)

As of December 31, 1965

Road and Equipment Property Account		*Estimated Liquidation Value*
ROAD		
(1)	Engineering	$ 0
(2)	Land for transportation purposes	107,411,700(a)
(2½)	Other right-of-way expenditures	0
(3)	Grading	0
(5)	Tunnels and subways	(4,000)
(6)	Bridges, trestles and culverts	(1,418,100)
(7)	Elevated structures	0
(8)	Ties	8,501,200
(9)	Rails	30,756,300
(10)	Other track material	8,610,100
(11)	Ballast	1,099,500
(12)	Track laying and surfacing	(10,967,200)
(13)	Fences, snowsheds and signs	0
(16)	Station and office buildings	961,100
(17)	Roadway buildings	(28,200)
(18)	Water stations	(1,000)

Exhibit NHI-42

Road and Equipment Property Account		*Estimated Liquidation Value*
ROAD		
(19)	Fuel stations	0
(20)	Shops and enginehouses	(505,200)
(23)	Wharves and docks	1,700
(24)	Coal and ore wharves	0
(26)	Communication systems	467,000
(27)	Signals and interlockers	374,600
(29)	Power plants	(175,100)
(31)	Power-transmission systems	1,898,800
(35)	Miscellaneous structures	0
(37)	Roadway machines	787,700
(38)	Roadway small tools	36,500
(39)	Public improvements-construction	(688,000)
(44)	Shop machinery	182,500
(45)	Power-plant machinery	(49,500)
	Total for Road	$147,252,400

(a) Also includes Account 737 land values

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
ESTIMATED COSTS OF FIRST THREE YEARS OF LIQUIDATION, INCLUDING LEASED AND AFFILIATED LINES (EXCLUDING REAL ESTATE COSTS)

	1st Year	2nd Year	3rd Year
	$	$	$
Executive			
Trustees' Office	19,761	19,761	19,761
Secretary	48,196	48,196	48,196
VP-Exec. Asst. to Trustees and Planning & Research	73,795	73,795	73,795
Treasurer	31,748	19,813	19,813
Operating-Transportation			
Personnel (Other than train)	301,580	226,279	176,593
Train Costs	79,000	36,000	36,000
Detour Costs	15,000	—	—
Per Diem	490,675	420,000	420,000
Drawbridge Operation (Generators)	150,000	—	—
Mechanical			
Labor (Administration, Car and Loco. Maint.)	322,091	126,887	126,887
Material (Car and Loco. Maint.)	88,014	86,343	86,343
Heating and Power Plants	239,300	210,000	210,000
Engineering			
General Office Building	43,205	—	—
Supervision, Admin., Etc.	724,667	724,667	724,667
Legal	1,000,000	1,000,000	1,000,000
Protection	213,981	213,981	213,981

Exhibit NHI-42

52c

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
ESTIMATED COSTS OF FIRST THREE YEARS OF LIQUIDATION, INCLUDING LEASED AND AFFILIATED LINES (EXCLUDING REAL ESTATE COSTS) (Cont'd)

	1st Year	2nd Year	3rd Year
	$	$	$
Accounting	473,000	108,000	108,000
Personnel	150,000	—	—
Machines			
Purchase, Sales, Stores	$ 172,910	$ 131,647	$ 85,554
Other	6,895	—	—
Public Relations	7,111	—	—
Insurance	34,724	18,930	18,930
Labor Rel. and Personnel	14,648	—	—
Freight Traffic			
(A) Fringes Payroll Tax, H&W, Vac., Hol., (23.1% of Labor Costs)	673,822	493,560	471,435
(B). Supplies, Expenses, Rents, Etc. (10%)	244,915	167,329	157,751
Total	$ 5,618,538	$ 4,125,188	$ 3,997,706
Three Year Total			$13,741,432

(A)—Standard fringe percentage based on GMA per cents and applied against labor portion of listed costs. Engineering supervision included vacation and holiday costs so only 13.75% applied against this item for payroll tax, health, and welfare.

(B)—This 10% factor was not applied to transportation costs (other than personnel), mechanical material, heating and power plants, engineering supervision, and accounting machines since these items were either material or all-inclusive costs.

Exhibit NHI-42

Exhibit NHI-44

Prepared Testimony of B. W. Thompson a Witness for the New Haven Trustees

—1—

My name is Bradford W. Thompson. I reside in Guilford, Connecticut and my office is at 54 Meadow Street, New Haven, Connecticut. I am employed as General Real Estate Agent of the New Haven Railroad.

In that capacity I am responsible for the administration and direction of the Railroad's Real Estate Department. The Department's functions include: negotiation of real estate sales and purchases for the Railroad; the preparation of deed descriptions and cooperation with counsel in the drafting of deeds; the negotiation and drafting of leases; the preparation of deed plans in connection with real estate transactions; the custody and administration of the Railroad's land valuation records; the representation of the Railroad in connection with all takings of land by eminent domain and in negotiation for the settlement of damages from such takings; all aspects of taxation of the Railroad's real estate and that of its leased lines, including the filing of abatement applications and the negotiation of tax settlements; as well as the protection of the Railroad's interest in real estate by reviewing all actual or potential challenges to that interest such as petitions

—2—

for changes in zoning, land court petitions, and participating in such proceedings where necessary. The Real Estate Department has thirty employees, including myself.

I have been employed by the New Haven for over 38 years, having entered railroad service on October 22, 1928 as a Rent Collector in the Real Estate Department's office in Boston, Massachusetts. The following year I was pro-

moted to Computor in the valuation section in the same office where I remained until early 1930 when I was transferred to New Haven, Connecticut. I remained in New Haven until February 15, 1948, serving in a variety of positions such as Senior Computor, Transitman, Assistant-Rent Bureau, Chief Clerk, Office Assistant, and Assistant to the General Real Estate Agent. On February 15, 1948 I was made Assistant Real Estate Agent located in Boston, and on March 16, 1949 was promoted to Real Estate Agent, with my office remaining in Boston. On December 1, 1961 I was appointed to my present position with headquarters in New Haven.

Page 1 of Exhibit , for identification, prepared under my direction and supervision, lists the number of sales completed by the Real Estate Department in the ten calendar years commencing with 1956, the gross considera-

tion from such sales, and the average gross consideration per sale by years. The figures on the exhibit include sales of property owned by leased lines and subsidiary companies, but principally involve New Haven properties. As shown by the exhibit, a very considerable volume of real estate transactions has been processed by the Real Estate Department in recent years.

I would like to point out that the consideration figures shown are gross, not net, figures, and do not reflect costs of sales which may be deducted before the net proceeds are deposited in the registry of the Reorganization Court.

As the statement shows, the year 1965 produced an exceptionally large amount of gross consideration. This resulted from a sale to the Massachusetts Bay Transportation Authority of the former Old Colony line from Boston to Braintree, Massachusetts. That sale was concluded

Exhibit NHI-44

November 1, 1965 and involved a gross consideration of $2,466,705. The year 1959 also included an extraordinary sale to the Consolidated Edison Company of New York, Inc. at $3,000,000. for the former Van Nest Shop property in New York.

—4—

In the ten years covered, 1668 sales have been completed for a total gross consideration of approximately 31 million. In the four full calendar years since the beginning of the present Trusteeship, 702 sales have been completed for a total gross consideration of about $12.5 million. From the beginning of reorganization through November 30, 1966, a total of 853 sales have been completed for gross consideration of about $13.9 million.

Mr. Gordon has testified to two studies made to estimate the value of the New Haven's properties on an assumed liquidation of the Railroad. I participated in both of these studies.

In the first study, which we sometimes refer to as the 1964 study, I was principally responsible for preparing an estimate of the liquidation value of the Railroad's real estate, both land and buildings. Because of the time limitations under which that study was prepared, it was not physically possible to make the type of review and analysis that would have been done had more time been available. Instead it was necessary to resort to shortcuts, utilizing to the maximum extent all readily available information.

—5—

At the outset of our work on the 1964 study, we were faced with the fact that no current valuation for the entire railroad was available. The only complete inventory of the Railroad's real estate was that made as part of the Commission's 1915 valuation. This valuation, with adjust-

ments for changes for additions and retirements from 1915 through 1945, was still in our files although, due to lack of personnel or need for the information, additions to and subtractions from the 1915 valuation list were not kept current after 1945.

In addition to these I.C.C. valuation figures, we had the benefit of a tax valuation for the year 1961 prepared by the State of New York covering all railroad property in the State. Also available were records of sales and acquisitions since 1945 and the record of transfers of property from one account to another, principally from operating to non-operating property.

I used all of this material in arriving at my estimate in the 1964 study of a market value in liquidation of $95,000,000 for land and buildings. The base for that estimate was the Commission's 1915 inventory adjusted to reflect additions and sales, and a further adjustment to reflect the New York State 1961 appraisal for tax purposes.

—6—

In addition, a quick review was made of areas where we knew that substantial value changes had taken place since 1915 or where known title defects significantly altered the base value, and appropriate adjustment was made. Buildings with an area in excess of 1,000 square feet were reviewed.

In the second liquidation study, which has also been summarized by Mr. Gordon, I was again responsible for evaluating the real estate properties of the New Haven. In addition, I estimated the liquidation value of the real estate properties of certain leased or affiliated lines in which the New Haven has stock ownership to assist in estimating the value of that stock.

My analysis assumed (1) that all operations of the Railroad other than "clean-up" operations ceased as of

Exhibit NHI-44

midnight December 31, 1965; (2) that the property being disposed of was that owned by the New Haven as of that date; (3) that sales would be in normal size parcels, in other words unusual sales, such as sales for highway purposes where continuity of ownership is required, were not assumed; and (4) that outstanding options such as those held by M.B.T.A. would be exercised.

—7—

Since more time was available for completion of the second study, a far more detailed analysis was possible than that done under the first study. In the second study, specific consideration was given to each part of the Railroad's property and values reached on a zone by zone basis. The estimates of fair market values arrived at were based upon my experience and that of my staff in the Railroad's Real Estate Department, known sales in the area, the record of existing railroad tax valuations, and the adaptability of the Railroad's property for other use. While we made no specific study of municipal zoning we did consider the present uses of property in the vicinity and relied upon such uses as an indication of possible future uses.

Property whose title was shown by the records of the Railroad to be questionable was discounted 50%. The only exception to this general approach was in connection with estimating the value of New Haven's security interest in the Holyoke and Westfield Railroad. In that case, the H&W has only location rights over land owned in fee by Holyoke Water Power Company. The latter is an active and knowledgeable company, and can only be assumed to be prepared to protect and assert its underlying interest in this prop-

—8—

erty. Accordingly, I believe H&W's interest in this property at best limited and used a figure of $50,000., which I reported to Mr. Gordon for his use.

Exhibit NHI-44

With regard to buildings, separate consideration was given to every building in excess of 1,000 square feet of ground area. I also considered whether upon discontinuance of rail operations a building would be a detriment rather than a benefit to the re-use of the land. Where the former was the case, I assumed that the building would be removed and so advised the Engineering Department for their consideration in connection with clearing the property for sale.

In addition to the foregoing, I made use of real estate appraisals made for the Trustees since the beginning of their Trusteeship. Among these were the appraisals of Arthur J. McCann covering the Oak Point and Harlem River freight yards in the Bronx section of New York City and the appraisal of Lawrence F. Dow covering the Railroad's office building in New Haven, Connecticut. Copies of summation sheets of these appraisals including Mr. McCann's revised summation on a liquidation basis are included as pages 30 to 33 of my exhibit. Wherever the Railroad had other specific appraisals available, I considered

these appraisals for the particular property involved.

My analysis has been broken down into the original 1915 valuation sections and subsections. I recognize, of course, that actual sales under liquidation undoubtedly would not be by these divisions. However, in my opinion, the use of such subsections is a reasonable breakdown of the Railroad's real estate for use in estimating its total value.

Pages 2 through 28 of my exhibit contain a detailed breakdown of the figures summarized on page 29. This breakdown is shown by States and by valuation subsections. Shown on these pages are the original I.C.C. 1915 valuation subsection numbers, a general description of the limits of

each such subsection, the area of land in each subsection owned by the New Haven as of December 31, 1965, and the estimated liquidation value of the land and evaluated buildings of each subsection as of the same date. In some cases the Railroad no longer owns any land in a given subsection, but I have nevertheless shown the subsection number. For example, the exhibit shows subsection 5.23 which extends from Harrison Square to Shawmut Junction in Boston, Massachusetts. This subsection is 2.07 miles long, but the

—10—

Railroad no longer owns any land within it. Exhibit — is a map which shows the valuation subsections established in 1915 and certain additional information. It will be noted that operations have been abandoned over many of the lines shown.

Page 29 of my exhibit summarizes the evaluation of the Railroad's real estate properties as of December 31, 1965. The figures on this summary have been furnished to Mr. Gordon for use in his exhibit encompassing the liquidation value of all assets of the Railroad. The statement summarizes the real property evaluation by states and shows figures separately for land and buildings. It will be immediately noted that a very substantial proportion of the total value is in those properties lying in New York State.

Because of the different methods used my figures in the two liquidation studies naturally differ. In the 1964 study I estimated a gross liquidation value for land and buildings of about $95 million. In the recent study I have estimated that the New Haven's land and buildings have a gross fair market value of approximately $114 million.

I have previously described some of the procedures used

—11—

in arriving at the estimates in the 1964 study, and the neces-

sity for adopting shortcuts at that time due to the limited time available for completion of the study. The different results are basically attributable to the inherent difference between a quick estimate and a detailed analysis. One of the principal areas of difference between the two studies is in the valuation of real estate in the State of New York. In the 1964 study we relied on a New York State tax valuation, while in the current study specific consideration was given to the property section by section. A second area of difference is that the estimated 1964 value as to certain properties was based on the 1915 inventory figures plus additions and accounting classifications modified at cost without reflection for their current value. Specific analysis in the more recent study has produced higher over-all figures.

In arriving at my estimates I did not give any weight to the possible impact of termination of the Railroad's operations on the real estate market generally. All of my estimates assumed normal market conditions. I did not discount the values arrived at for any general impact of liquidation on the region's economy or on its real estate market. I am aware that in the earlier Penn-Central merger

proceedings and in the New Haven's interstate passenger case a number of public witnesses testified that serious adverse economic consequences would result from discontinuance of the Railroad's transportation operations. To the extent that such an adverse effect would be reflected in the real estate market my values have been overstated.

In addition to the foregoing, I participated in the preparation of estimates with respect to costs that would be incurred by the Railroad in disposing of its real estate assets in an assumed liquidation. The results of that analysis were furnished to Mr. Gordon and are included in his

exhibits. In that connection, I would like to point out that as of December 31, 1965 the New Haven had an outstanding balance of unpaid real estate taxes totaling about $16,072,565. During the course of the present reorganization, it has been the Railroad's regular practice to pay outstanding taxes on conveyed property. In arriving at my estimates of value I have assumed that all back taxes would be paid at the time of conveyance. If such payment were not to be made at that time, it is my opinion that liquidation values would be substantially less than indicated in the study. Accordingly, I have advised Mr. Gordon that the outstanding tax liability should be considered in his study.

Exhibit NHI-51

Second Appraisal of the Harlem River and Oak Point Yards, Arthur J. McCann, for the New Haven Trustees

* * * * *

APPRAISAL OF REAL PROPERTY

HARLEM RIVER BRANCH,
THE NEW YORK,
NEW HAVEN and HARTFORD RAILROAD COMPANY

On request I have examined and appraised the real property known as the Harlem River Branch of The New York, New Haven and Hartford Railroad Company which extends from Harlem River and Lincoln Avenue, Bronx County to New Rochelle, Westchester County, State of New York; and I have estimated the time necessary to dispose of this property and certain disposal costs, arriving at the liquidation value as set forth in this report.

VALUE AS OF DECEMBER 31, 1965

PARCEL NOS. 1A to 1E	$10,319,900.00
(I appraised this property as a freight yard of an operating railroad as of June 15, 1965 at $13,000,000.00)	
PARCEL NO. 2	322,830.00
PARCEL 3A	179,226.00
PARCEL NO. 3B	7,591,864.00
(I appraised this property as a freight yard of an operating railroad as of June 15, 1965 at $9,650,000.00)	
PARCEL NO. 4	5,646,298.00
PARCEL NO. 5	172,161.00
PARCEL NO. 6	347,000.00
TOTAL APPRAISED VALUE (SAY)	$24,600,000.00

Respectfully submitted,

/s/ ARTHUR J. MCCANN

Exhibit NHI-51

APPRAISAL OF REAL PROPERTY

HARLEM RIVER BRANCH,
THE NEW YORK,
NEW HAVEN and HARTFORD RAILROAD COMPANY

TOTAL APPRAISED VALUE:		$24,600,000.00
NECESSARY LIQUIDATION EXPENSES		
Real estate taxes	$2,167,300.	
Brokerage commissions	1,225,700.	
Real estate department expenses	500,000.	
Appraisal fees	25,000.	
Transfer taxes	11,330.	$ 3,929,330.00
NET LIQUIDATION VALUE:		$20,670,670.00

Respectfully submitted,

/s/ ARTHUR J. MCCANN

Exhibit NHI-51

PARCEL No. 1A—

PART OF HARLEM RIVER FREIGHT YARD, BRONX, N. Y.
Lincoln Avenue to Willis Avenue and Harlem River

SIZE:

1,200' x 1,120' x irregular

AREA:

Approximately 670,000 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Flat, level land with old brick building, former station, and concrete block macadam and asphalt paving which do not add value to the value of the land

MARKETING TIME:

One (1) Year

VALUE:

670,000 sq. ft. @ $2.30 per sq. ft.		$1,541,000.00
Less: Value of Easement (Willis Avenue Bridge)		10,000.00
		$1,531,000.00
EXPENSES:		
Real Estate Taxes	$50,000.	
Brokerage	$77,000.	$ 127,000.00
LIQUIDATION VALUE:		$1,404,000.00

Exhibit NHI-51

PARCEL No. 1B—

PART OF HARLEM RIVER FREIGHT YARD, BRONX, N. Y.
Willis Avenue to Brown Place and Harlem River

SIZE:

940′ x 1,120′ x irregular

AREA:

Approximately 880,000 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Flat, level land with very old frame buildings which do not add value to the value of the land.

MARKETING TIME:

Two (2) Years

VALUE:

880,000 sq. ft. @ $2.30 per sq. ft.		$2,024,000.00
EXPENSES:		
Real Estate Taxes	$132,000.	
Brokerage	$101,000.	$ 233,000.00
LIQUIDATION VALUE:		$1,791,000.00

Exhibit NHI-51

PARCEL No. 1C—

PART OF HARLEM RIVER FREIGHT YARD, BRONX, N. Y.
Brown Place to Triborough Bridge and Bronx Kills

SIZE:

400′ x 1,000′ x irregular

AREA:

810,000 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Flat, level land improved with former Railway Express Agency warehouse, modern steel and concrete block warehouse, and freight platform

MARKETING TIME:

Two (2) Years

VALUE:

Land: 810,000 sq. ft. @ $2.30 per sq. ft.		$1,863,000.00
REA Building		400,000.00
Warehouse		460,000.00
		$2,723,000.00
Less: Value of Easement (Tri-Boro Bridge)		9,600.00
		$2,713,400.00
EXPENSES:		
Real Estate Taxes	$182,000.	
Brokerage	$136,000.	$ 318,000.00
LIQUIDATION VALUE:		$2,395,400.00

Exhibit NHI-51

PARCEL No. 1D—

PART OF HARLEM RIVER FREIGHT YARD, BRONX, N. Y.
Triborough Bridge to Walnut Avenue and Bronx Kills

SIZE:

1,000′ x 1,460′ x irregular

AREA:

Approximately 1,200,000 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Partly flat land improved with a brick garage, freight platform and old frame buildings

MARKETING TIME:

Three (3) Years

VALUE:

Land:	416,000 sq. ft. @ $2.80 per sq. ft.		$1,164,800.00
	784,000 sq. ft. @ $2.30 per sq. ft.		1,803,200.00
Garage			70,000.00
			$3,038,000.00
Less: Value of Easement (N.Y. Conn. Railroad)			165,000.00
			$2,873,000.00
EXPENSES:			
Real Estate Taxes		$270,000.	
Brokerage		$150,000.	420,000.00
LIQUIDATION VALUE:			$2,453,000.00

Exhibit NHI-51

PARCEL No. 1E—

PART OF HARLEM RIVER FREIGHT YARD, BRONX, N. Y.
Locust Avenue, East 132nd Street and East River

SIZE:

500′ x 1,000′ x irregular

AREA:

Approximately 425,000 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Flat, level land improved with two brick warehouses

MARKETING TIME:

One (1) Year

VALUE:

Land: 425,000 sq. ft. @ $2.30 per sq. ft.		$ 977,500.00
Warehouse (Tiefer)		150,000.00
Warehouse (A&P)		50,000.00
		$1,177,500.00

EXPENSES:

Real Estate Taxes	$39,000.	
Brokerage	$59,000.	98,000.00
LIQUIDATION VALUE:		$1,079,500.00

Exhibit NHI-51

PARCEL No. 2—

EAST 132ND STREET TO EAST 149TH STREET, BRONX, N. Y.
Right of Way

AREA:

Approximately 341,820 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Partly, elevated, partly level and partly below street land.

MARKETING TIME:

Five (5) Years

VALUE:

Land at various units		$322,830.00
EXPENSES:		
Real Estate Taxes	$23,000.	
Brokerage	$16,000.	39,000.00
LIQUIDATION VALUE:		$283,830.00

Exhibit NHI-51

PARCEL No. 3A—

RIGHT OF WAY AT OAK POINT FREIGHT YARD

AREA:

Approximately 89,613 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Level land about 25' below street level.

MARKETING TIME:

One (1) Year

VALUE:

89,613 square feet @ $2.00 per sq. ft.		179,226.00

EXPENSES:

Real estate taxes	$6,800.	
Brokerage	$8,900.	15,700.00
		$163,526.00

LIQUIDATION VALUE:

Exhibit NHI-51

PARCEL No. 3B—

OAK POINT FREIGHT YARD, BRONX, NEW YORK
East 149th Street and East River

SIZE:

872' x 1,864.76' x irregular

AREA:

Approximately 3,295,932 square feet

ZONING:

M3-1 (Heavy Industrial)

DESCRIPTION:

Flat, level freight yard, improved with two modern warehouses and various frame and brick railroad buildings.

MARKETING TIME:

One (1) Year

VALUE:

3,295,932 sq. ft. @ $2.00 per sq. ft.		$6,591,864.00
Warehouse (Becker)		750,000.00
Warehouse (Idaho Potato)		250,000.00
		$7,591,864.00

EXPENSES:

Real Estate Taxes	$250,000.	
Brokerage	$380,000.	630,000.00
LIQUIDATION VALUE:		$6,961,864.00

Exhibit NHI-51

PARCEL No. 4—

OAK POINT TO NEW YORK CITY-WESTCHESTER COUNTY LINE

Right of Way and adjacent lands

AREA:

Approximately 5,575,157 square feet

ZONING:

Varies: Residental, Commercial and Industrial

DESCRIPTION:

Land at street level, below street level and above street level.

MARKETING TIME:

Six (6) Years

VALUE:

Various Units		$5,646,298.00

EXPENSES:

Real Estate Taxes	$1,200,000.	
Brokerage	$ 280,000.	1,480,000.00
LIQUIDATION VALUE:		$4,166,298.00

Exhibit NHI-51

PARCEL No. 5—

PELHAM MANOR, N. Y.
Right of Way

AREA:

Approximately 558,575 square feet

ZONING:

Residential

DESCRIPTION:

Land at various levels running through residential areas.

MARKETING TIME:

Six (6) Years

VALUE:

Various Units		$172,161.00

EXPENSES:

Real Estate Taxes	$10,500.	
Brokerage	$ 8,500.	19,000.00
LIQUIDATION VALUE:		$153,161.00

Exhibit NHI-51

PARCEL No. 6—

NEW ROCHELLE, NEW YORK

Right of Way and adjacent lands

AREA:

Approximately 604,480 square feet

ZONING:

Commercial and Industrial

DESCRIPTION:

Mostly elevated land

MARKETING TIME:

Three (3) Years

VALUE:		
Various units		$347,000.00
EXPENSES:		
Real Estate Taxes	$10,800.	
Brokerage	$18,200.	29,000.00
LIQUIDATION VALUE:		$318,000.00

Exhibit NHI-52

First Appraisal of the Oak Point Yard by Arthur J. McCann, for the New Haven Trustees

Land

Size of Plot:

1,864.76′ x 872′ x irregular

Area of Plot:

3,295,932 square feet (73.368 acres)

Frontages:

East 149th Street and East River

Zoning:

M3-1 (Heavy industrial)

Computation

Unit Lot (25′ x 100′) Value:

$6,250.00 or $2.50 per square foot

3,295,932 square feet @ $2.50 per square foot $8,239,830.00

Appraised Land Value (Say) $8,240,000.00

Improvements

The Becker, Leonard, Singer warehouse is a modern, sprinklered building containing an area of approximately 139,000 square feet which was erected in 1955. Construction is of concrete foundations, concrete block walls, concrete floor, steel frame and steel deck roof with a clearance of sixteen (16) feet. Rail loading is from the east side of the building and truck loading is from the west side. The

building is well maintained and in good condition with only minor repairs necessary at this time. The building is rented to three tenants paying a total annual rental of $109,617.08.

The Idaho Potato building, erected in 1962, is similar to the above building in construction. It has a clearance of fourteen (14) feet under the steel trusses. The building is in excellent condition. Rail loading is from the east side of the building and truck loading facilities are at the north, south and west sides of the building. Eleven Lennox oil fired heaters attached to the steel trusses provide heat. The entire building is leased to one tenant at an annual rental of $30,570.00

Ten (10) miscellaneous buildings are located throughout the yard and used in the operation of the railroad freight yard. These buildings of brick, frame and metal construction are adequately used in the railroad operations but because of their age, condition, size and locations would be of little value to any other user of this property.

The easterly end of the property at the East River is improved with a timber bulkhead and five steel truss electric adjustable transfer bridges supported by overhead steel frame work with timber fender racks.

A six (6) foot high chain link fence extends along the East 149th Street frontage of the property.

The Oak Point Freight yard of The New York, New Haven and Hartford Railroad Company is located in the southeast part of the Borough of The Bronx, City and State of New York.

This property in a heavy industrial zone fronts on the East River and East 149th Street and is adjacent to Bruckner Boulevard and Bruckner Expressway, an arterial

highway which connects with the Tri-Borough Bridge and the New England Thruway. This property is in an excellent location to serve all parts of New York City, Westchester County and Connecticut. Public transportation by subway and bus is two blocks west of the property.

The areas to the north and to the west are heavily populated with an abundance of skilled and unskilled labor, male and female, living within easy walking distance of this property. The area to the east is principally industrial with very little land available for improvement.

The East River with its deep water, the fine advertising features because of its great frontage adjacent to the Bruckner Expressway, its large size as well as its railroad facilities make this property one of the most desirable industrial facilities in New York City.

The two modern warehouse buildings now on this property are so constructed and situated on the land that they can easily be extended to provide large amounts of extra space for present tenants or other industrial firms.

New industrial building in the area of this property will shortly use up all the available land of sufficient size to attract sizable concerns leaving the appraised property as the only land that can be used for improvement.

Improvements	*Values*
Becker, Leonard, Singer Warehouse	$ 1,000,000.00
Idaho Potato Warehouse	$ 280,000.00
Miscellaneous yard buildings	$ 61,000.00
Surfacing	$ 66,200.00
Fencing	$ 2,800.00
TOTAL VALUE—IMPROVEMENTS:	$ 1,410,000.00

Exhibit NHI-52

SALES OF COMPARABLE PROPERTIES

1. R. Hoe & Co., Inc.
910 East 138th Street
Bronx, N.Y.

Deed Dated: 3–19–1962
Recorded: 3–26–1962
Liber: 2478, cp 11
Consideration: $ 525,000.00

to

The Pittston Company
250 Park Avenue
New York, N.Y.

Premises: East River and East 138th Street, Bronx, N.Y. Block 2595, lot 107. Size 234′ x 440′. 103,194 square feet of upland.

2. Burns Bros.
222 Varick Street
Brooklyn, N.Y.

Deed Dated: 4–11–1958
Recorded: 4–16–1958
Liber: 2281, cp 481
Consideration: $ 350,000.00

to

Metropolitan Petroleum Corp.
514 Kinderkamack Road
Oradell, New Jersey

Premises: East River and East 136th Street, Bronx, N.Y. Block 2595, lot 70. Size: 232′ x 442.77′ 102,544 square feet of upland.

Exhibit NHI-52

3. New York Central Railroad Company
466 Lexington Avenue
New York, N.Y.

Deed Dated: 11–14–1962
Recorded: 11–28–19
Liber: 2508, cp 414
Consideration: $3,000,000.00

to

Concourse Village Inc.
32 Broadway
New York, N.Y.

Premises: Morris Avenue, 541.131′ south of East 161st Street, Bronx, N.Y. Block 2443, part of lot 72. Size: 528′ x 830′ 435,215 square feet of land in railroad yard.

4. Misuma Realty Corp.
448 Tiffany Street
Bronx, N.Y.

Deed Dated: 10–1–1956
Recorded: 10–4–1956
Liber: 2206, cp 9
Consideration: $ 135,000.00

to

G-B Holding Corporation
777 East 138th Street
Bronx, N.Y.

Premises: Oak Point Avenue and Barry Street, Bronx, N.Y. Block 2606, lot 172. Size: 200′ x 220′ 44,000 square feet of industrail land improved with old building now replaced by grantee with modern structure.

Exhibit NHI-52

5. Lily-Tulip Cup Corporation
122 East 42nd Street
New York, N.Y.

Deed Dated: 12–27–1962
Recorded: 12–31–1962
Liber: 2512, cp 392
Consideration: $2,800,000.00

to

Cystoscope Equities Inc.
1500 Bassett Avenue
Bronx, N.Y.

Premises: 1500 Bassett Avenue, Bronx, N.Y. Block 4226, part of lot 5. Approximately 800,000 square feet of land improved with a warehouse containing 291,000 square feet of space.

6. Lily-Tulip Cup Corporation
122 East 42nd Street
New York, N.Y.

Deed Dated: 3–15–1963
Recorded: 3–19–1963
Liber: 2525, cp 285
Consideration: $1,225,000.00

to

Julius Katz
3530 Decatur Avenue
Bronx, N.Y.

Premises: Eastchester Road, Bronx, N.Y. Block 4224 and Block 4226. Approximately 13 acres of industrial land.

Exhibit NHI-52

7. Jacob J. Alpern
8 Overlook Road
Scarsdale, N.Y.

Deed Dated: 3–7–1962
Recorded: 3–9–1962
Liber: 2476, cp 131
Consideration: $ 772,500.00

to

Silmar Realty Corp.
144-35 68th Road
Kew Gardens, N. Y.

Premises: Bryant Avenue and Viele Street, Bronx, N.Y. Block 2777, lots 292 and 342. Size: 600′ x 515′ 309,000 square feet of industrial land.

8. Edroyal Corporation
Ferry Terminal,
Liberty, Street
New York, N.Y.

Deed Dated: 3–20–1963
Recorded: 3–22–1963
Liber: 2526, cp 266
Consideration: $ 269,500.00

to

Pasquale Santini, Inc.
1405 Jerome Avenue
Bronx, N.Y.

Premises: Harlem River and East 135th Street, Bronx, N.Y. Block 2319, lot 55. Size: 220.34′ x 240.92′ x irregular. 134,100 square feet of upland requiring the demolition of reinforced coal pockets and the filling in of the former Mott Haven Canal.

Exhibit NHI-52

9. Canal & 3rd Co.
140 Lockwood Avenue
New Rochelle, N.Y.

Deed Dated: 5–23–1962
Recorded: 5–24–1962
Liber: 2485, cp 382
Consideration: $ 235,500.00

to

Richard C. & Mary G. Mugler
4611 Arlington Avenue
Bronx, N.Y.

Premises: Harlem River and Third Avenue, Bronx, N.Y. Block 2319, lot 20 Size: 138.15′ x 177.64′ x irregular 78,577 square feet of upland improved with several very old industrial buildings.

10. Defem Corporation, Inc.
20 Exchange Place
New York, N.Y.

Deed Dated: 8–9–1955
Recorded: 8–10–1955
Liber: 2140, cp 297
Consideration: $ 365,000.00

to

Providence Produce Warehouse Co., Inc.
70 East 45th Street
New York, N.Y.

Premises: Harlem River and Lincoln Avenue, Bronx, N.Y. Block 2316, lot 1. Size: 518.20′ x 430′ x 333.16′ x 241.86′ 133,806 square feet of upland.

Exhibit NHI-52

11. The New York Central Railroad Company
466 Lexington Avenue
New York, N.Y.

Deed Dated: 10–20–1964
Recorded: 12–22–1964
Liber: 2634, cp 323
Consideration: $2,040,000.00

to

Wembley Realty Corp.
16 Court Street
Brooklyn, N.Y.

Premises: West 230th Street and Ewen Avenue, Bronx, N.Y. Block 5710 and Block 5717, part of lot 700 and Block 2215 in New York County, part of lot 89. 435′ x 680′ x irregular. 900,000 square feet of railroad yard.

12. Providence Produce Warehouse Co., Inc.
Room 3620, Grand Central Station
New York, N.Y.

Deed Dated: 8–24–1959
Recorded: 10–16–1959
Liber: 2359, cp 13
Consideration: $ 300,000.00

to

Summit Holding Co., Inc.
286 East 137th Street
Bronx, N.Y.

Premises: Harlem River and Lincoln Avenue, Bronx, N.Y. Block 2316, lot 1. 518.20′ x 430′ x 333.16′ x 241.86′ 133,806 square feet of upland.

Exhibit NHI-53
First Appraisal of the Harlem River Yard by Arthur J. McCann, for the New Haven Trustees

* * * * *

Land

Size of Plot:
262.73′ x 877.43′ x irregular

Area of Plot:
3,985,439 square feet (91.49 acres)

Frontages:
Lincoln Avenue, Bronx Kills, East River & East 132nd Street

Zoning:
M3-1 (Heavy industrial)

Computation

Unit Lot (25′ x 100′) Values:
$7,500.00 or $3.00 per square foot
$6,250.00 or $2.50 per square foot

416,000 square feet @ $3.00 per square foot	$ 1,248,000.00
3,569,439 square feet @ $2.50 per square foot	$ 8,923,597.50
	$10,171,597.50
Appraised Land Value (Say)	$10,200,000.00

The Harlem River Freight Yard of The New York, New Haven and Hartford Railroad Company is located at the southern end of the Borough of The Bronx, City and State of New York.

Exhibit NHI-53

This property extends from Lincoln Avenue at its westerly end to the East River at its easterly end, a distance of approximately 6,800 linear feet. Its entire plottage of almost 4,000,000 square feet is in a heavy industrial zone. Its frontage on the East and Harlem Rivers together with its railroad facilities make it a unique industrial facility that could be well used by any heavy industrial concern.

The area to the north of the property for two blocks is principally industrial and beyond this point the area becomes principally residential with some store and other commercial properties on East 138th Street. Public transportation by bus and subway is within easy walking distance.

The elevated Willis Avenue viaduct and the Tri-Borough Bridge cross the property.

Motor transportation from the property to Manhattan, Long Island and New England is excellent as the Third Avenue Bridge to Manhattan, the entrance to the Tri-Borough Bridge and access to the Bruckner Expressway which connects with the New England Thruway is only a few minutes drive from this property.

The residential area north of the property provides an abundance of skilled and unskilled labor, male and female, who can walk from their homes to this property. Banking facilities, restaurants, supply houses of all kinds, recreational facilities, hospitals, business and professional offices and all other facilities that industrial concerns need are located in the immediate neighborhood of this property.

Recent sales of industrial properties in this area to concerns which are using the properties for their own businesses leaves the appraised property as the only large available property that might be acquired by heavy industry.

Exhibit NHI-53

Because of its size, excellent location and its many improvements this property is a most desirable industrial facility that should be usable to all heavy industrial concerns.

IMPROVEMENTS

The Produce Warehouse in size 35′ x 1,200′ is about twenty (20) feet in height and constructed of brick with concrete floor, wood roof covered with ruberoid supported by steel I beams resting on iron lally columns. Wood doors and wood platforms supported by brick piers on north and south sides of building are in only fair condition. Terra cotta partitions and toilet rooms are not in good condition. A boiler room contains an H.B. Smith Series 44 Mills boiler, fired by a Petro oil burner, Model G8-213, No. FC1-91TA. Fuel is stored in a 2,000 gallon tank. This building is rented to ten (10) tenants for a total annual rental of $28,651.16.

The former REA building was built in 1928 of steel frame with brick curtain walls, gypsum slab roof supported by steel trusses. This building is thirty-two (32) feet in height with a clearance of 18′ under the steel trusses. The westerly end of the building has three (3) floors with the second and third floors formerly used as offices, locker rooms and wash rooms. This building, structurally good, has not been well maintained and many repairs are now necessary. New leaders and new gutters should be installed immediately and all exposed steel needs to be painted.

The Keystone-Nevins building is a modern structure in excellent condition. This building is of steel frame construction, steel deck roof, concrete block walls, modern office space, fluorescent lighting fixtures, steel overhead doors

Exhibit NHI-53

and wood overhead doors. Three (3) rows of glass brick at the top of the walls provide good natural light. The steel deck roof is supported by steel trusses and the roof is ruberoid covered. Heat is provided by an American Radiator Company No. 403 oil fired boiler.

The Tiefer warehouse is a brick building with steel columns and beams and is eighteen (18) feet in height. The north end of the building is divided into several refrigerated spaces and the south end is mostly open warehouse and shipping space. A second floor office with rubber tile floor covering, steel fenestra windows and wash rooms in good condition is located in about the center of the building. Carrier Heaters are placed in various parts of the building with steam supplied by the adjacent Consolidated Edison Company plant. This building is in good condition and is rented at an annual rental of $19,000.00.

The A & P warehouse is similar in construction to the Tiefer warehouse, also has a second floor office, receives steam from the Consolidated Edison Company plant and is also a building in good condition. The annual rent for this building is $14,032.68.

The Freight House, in size approximately 50′ x 600′, is in excellent condition. This building is of steel frame construction with brick and glass block walls, concrete plank roof supported by steel trusses.

The North and South Platforms have concrete floors, roofing boards with ruberoid covering and supported by steel trusses. Metal siding has been placed in a good portion of these platforms. These platforms are in fair condition and provide good storage and shipping space. Rentals from ten (10) tenants provide $32,281.20 per annum.

Exhibit NHI-53

The New England Transportation Company garage containing 10,000 square feet of space is a good brick building with clear space. A wood roof covered with ruberoid is supported by wood trusses. Heat is provided by an International boiler, fired by a Petro oil burner. Fuel is stored in a 1,080 gallon tank. Hot water is provided by a Burnham Heater, fired by a Sun Ray oil burner Model 1CA, Serial # AX-111.

The automobile loading platform in size 24′ x 765′ is in good condition.

The miscellaneous yard buildings consist of eighteen (18) structures of various sizes and constructed of brick, wood and metal and are used in the operation of this railroad yard. Most of these buildings are old and only useful to the railroad.

The surfacing and fencing is generally in good condition.

Exhibit NHI-53

SURFACING

AREA A	80,000 square feet, macadam & concrete	$ 32,000.00
AREA B	45,000 square feet, concrete	45,000.00
AREA C	210,000 square feet, reinforced concrete	210,000.00
AREA D	15,000 square feet, macadam	6,000.00
AREA E	85,000 square feet, reinforced concrete	85,000.00
AREA F	138,000 square feet, reinforced concrete	138,000.00
AREA G	25,000 square feet, reinforced concrete	25,000.00
AREA H	22,500 square feet, granite block	4,500.00
AREA I	21,250 square feet, granite block	4,250.00
AREA J	75,000 square feet, reinforced concrete	60,000.00
AREA K	5,000 square feet, macadam	2,000.00
AREA L	6,250 square feet, granite block	1,250.00
AREA M	32,000 square feet, reinforced concrete	25,600.00
AREA N	45,000 square feet, macadam	27,000.00
AREA O	52,500 square feet, macadam	31,500.00
AREA P	150,000 square feet, reinforced concrete, asphalt	75,000.00
TOTALS	1,007,500 square feet	$772,160.00

Exhibit NHI-53

FENCING

216 linear feet chain link fence, 5'6" high	$ 432.00
350 linear feet chain link fence, 7' high	1,400.00
300 linear feet chain link fence, 6' high	900.00
2,000 linear feet chain link fence, 6' high	5,000.00
75 linear feet chain link fence, 6' high	375.00
1,600 linear feet chain link fence, 7' high	4,000.00
380 linear feet chain link fence, 5' high	760.00
TOTALS 4,921 linear feet chain link fence	$12,867.00

Improvement	*Values*
PRODUCE WAREHOUSE	$ 94,500.00
FORMER REA BUILDING	675,000.00
KEYSTONE-NEVINS BUILDING	460,000.00
TIEFER WAREHOUSE	215,000.00
A & P FISH WAREHOUSE	75,000.00
FREIGHT HOUSE	180,000.00
NORTH PLATFORM	36,000.00
SOUTH PLATFORM	72,000.00
NEW ENGLAND TRANSPORTATION GARAGE	70,000.00
AUTOMOBILE LOADING PLATFORM	34,000.00
MISCELLANEOUS YARD BUILDINGS	100,000.00
SURFACING	772,160.00
FENCING	12,867.00
	$2,796,527.00
APPRAISED VALUE—IMPROVEMENTS (SAY)	$2,800,000.00

Exhibit NHI-55

Portion of First Appraisal by Arthur J. McCann of the Oak Point Yard, for the New Haven Trustees

QUALIFICATIONS

The undersigned states that he is a licensed (New York, New Jersey and Connecticut) real estate broker, appraiser and agent, having offices at 1250 East Gun Hill Road, County of Bronx, City and State of New York, and that he has been continuously engaged as such for the past thirty five years;

that he is a graduate of the University of Notre Dame, Notre Dame, Indiana;

that for the past thirty-five years he has bought, sold, leased, managed, mortgaged and appraised real property in the New York Metropolitan Area;

that he has negotiated many sales of industrial properties, waterfront and inland, in the Borough of The Bronx in which the subject property is located;

that over the years he has supplemented his practical experience by studying all recognized methods used in appraising real property;

that he is a member of The Real Estate Board of The Bronx, Inc., a member of its Board of Governors and Chairman of its Ethics Committee;

that he is a member of the New York State Society of Real Estate Appraisers;

that he is a member of the Society of Industrial Realtors, (an international society of industrial real estate special-

ists) a member of its Board of Directors and a past president of its New York Chapter;

that he is a member and a past president of The Industrial Real Estate Brokers Association of The New York Metropolitan Area;

that he is a member of the American Chapter, International Real Estate Federation;

that he is Chairman of Community Planning Board, No. 9, Bronx County;

that he has made appraisals for several of the large railroad companies, banks, attorneys, insurance companies and for many private business concerns;

that he has appraised special purpose properties, some of which are:

Yankee Stadium (Land only)
Polo Grounds
Dynamite storage plant for E.I. duPont de Nemours, & Co., Inc.
Boat repair yard for Nevins Yacht Yard
Baker Field (Land only) for Columbia University
Meat processing plant for Paramount Meat Processors
Wholesale meat plant for Wilson & Co., Inc.
Coal storage and distribution plant for Premium Coal & Oil Co., Inc.
Construction and equipment buildings for Corbatta Construction Co., Inc.
Synagogue for Jewish Community of Hunts Point
School and convent for The Missionary Sisters
Bulk fuel oil terminals in New York City, Long Island, Westchester County and Connecticut for Metropolitan Petroleum Company, division of the Pittston Company;

Exhibit NHI-55

that he is a member of Omega Tau Rho, the honorary society of The National Association of Real Estate Boards;

that he has qualified and has testified as a real estate appraiser in New York State Supreme Court, Court of Claims and Bronx County Surrogate's Court.

• • • • • • •

The appraised values herein stated were arrived at through the knowledge and experience acquired in selling, leasing, managing, mortgaging and appraising industrial properties throughout the years; by considering the prices paid for comparable properties; by considering the character of the neighborhood in which the property is located; and by considering all other circumstances, conditions and factors which should be considered in arriving at the fair and reasonable market value of this property as of November 8, 1965.

/s/ Arthur J. McCann

Exhibit NHI-55

APPRAISAL OF REAL PROPERTY
EAST 149th STREET & EAST RIVER
BRONX, NEW YORK.

On request I have examined and appraised the real property located at East 149th Street and East River, Borough of The Bronx, City and State of New York, being part of the Oak Point Freight Yard of The New York, New Haven and Hartford Railroad Company, and designated on the tax maps of the City of New York as Lot 251 and part of Lot 74 of Block 2604.

FAIR AND REASONABLE MARKET VALUE
AS OF
NOVEMBER 8, 1965

PARCEL No. 1	$ 13,700.00
PARCEL No. 2	$1,219,900.00
TOTAL APPRAISED VALUES— PARCELS No. 1 & 2	$1,233,600.00

Respectfully submitted,

/s/ ARTHUR J. MCCANN

Sworn to before me this
8th day of November, 1965

/s/ IVOR J. SWANSON

IVOR J. SWANSON
Notary Public, State of New York
No. 03-3910815
Qualified in Bronx County
Commission Expires March 30, 1967

Exhibit NHI-55

LAND

PARCEL No. 1

SIZE of PLOT:	315.59′ x 225.93′ x 186.19′
AREA of PLOT:	Approximately 20,750 square feet
Area of Upland:	8,324 square feet
Land under Water:	12,426 square feet
FRONTAGE:	315.59′ on East 149th Street
ZONING:	M3-1 (Heavy industrial)

COMPUTATION

UNIT LOT (25′ x 100′) Value: UPLAND:		$3,750.00
LAND UNDER WATER		$ 250.00
8,324 square feet @ $3,750.00 per lot or $1.50 per sq. ft.		$12,486.00
12,426 square feet @ $250.00 per lot or .10¢ per sq. ft.		$ 1,242.60
		$13,728.60
APPRAISED VALUE (SAY)		$13,700.00

Exhibit NHI-55

LAND

PARCEL No. 2

SIZE of PLOT:	310′ x 580′ x irregular
AREA of PLOT:	Approximately 699,554 square feet
Area of Upland:	573,934 square feet
Land under Water:	80,060 square feet, inside bulkhead line
Land under Water:	45,560 square feet, outside bulkhead line
FRONTAGES:	310′ on East 149th Street 580′ on East River
ZONING:	M3-1 (Heavy industrial)

COMPUTATION

UNIT LOT (25′ x 100′) Value:

$6,250.00 for UPLAND north of passway
$3,750.00 for UPLAND south of passway
$ 250.00 for LAND UNDER WATER

UPLAND VALUES

449,934 sq.ft (North of Passway) @ $6,250. or $2.50 per sq. ft.	$1,124,835.00
58,000 sq.ft. (South of Passway) @ $3,750. or $1.50 per sq. ft.	$ 87,000.00
60,000 sq.ft. Area of Passway	$ 1.00
6,000 sq.ft. Area of Passway	$ 1.00

LAND UNDER WATER VALUES

80,060 sq.ft., inside bulkhead line @ $250. or 10¢ per sq.ft.	$ 8,060.00
45,560 sq.ft., outside bulkhead line	$ 1.00
	$1,219,898.00
APPRAISED VALUE: (SAY)	$1,219,900.00

Exhibit NHI-55

SALE OF COMPARABLE PROPERTIES

1. R. Hoe & Co., Inc.
910 East 138th Street
Bronx, N.Y.C.

Deed Dated: 3/19/1962
Recorded: 3/26/1962
Liber: 2478, cp 11
Consideration: $ 525,000.00

to

The Pittston Company
250 Park Avenue
New York, N.Y.

Premises: East River and East 138th Street, Bronx, N.Y. Block 2595, Lot 107. Size: 234′ x 440′. 103,194 square feet of industrial water front land improved with frame and steel buildings.

Sale analyzes at $3.65 per square foot for land.

2. Burns Bros.
222 Varick Street
Brooklyn, N.Y.

Deed Dated: 4/11/1958
Recorded: 4/16/1958
Liber: 2281, cp 481
Consideration: $ 350,000.00

to

Metropolitan Petroleum
Corp.
514 Kinderkamack Road
Oradell, New Jersey

Premises: East River and East 136th Street, Bronx, N.Y. Block 2595, Lot 70. Size: 232′ x 442.77′. 102,544 square feet of industrial water front land improved with coal silo.

Sale analyzes at $3.90 per square foot for land.

Exhibit NHI-55

3. Misuma Realty Corp.
448 Tiffany Street
Bronx, N.Y.C.

Deed Dated: 10/1/1956
Recorded: 10/4/1956
Liber: 2206, cp 9
Consideration: $ 135,000.00

to

G B Holding Corporation
777 East 138th Street
Bronx, N.Y.C.

Premises: Oak Point Avenue and Barry Street, Bronx, N.Y. Block 2606, Lot 172. Size: 200′ x 220′. 44,000 square feet of ind trial land improved with old building now replaced by grantee with modern building.

Sale analyzes at $2.37 per square foot for land.

4. Jacob J. Alpern
8 Overlook Road
Scarsdale, N.Y.

Deed Dated: 3/7/1962
Recorded: 3/9/1962
Liber: 2476, cp 131
Consideration: $ 772,500.00

to

Silmar Realty Corp.
144-35 68th Road
Kew Gardens, N.Y.

Premises: Bryant Avenue and Viele Street, Bronx, N.Y. Block 2777, Lots 292 and 342. Size: 600′ x 515′. 309,000 square feet of industrial land.

Sale analyzes at $2.02 per square foot.

Exhibit NHI-55

5. Edroyal Corporation
Ferry Terminal,
Liberty Street
New York, N.Y.

Deed Dated: 3/20/1963
Recorded: 3/22/1963
Liber: 2526, cp 266
Consideration: $ 269,500.00

to

Pasquale Santini, Inc.
1405 Jerome Avenue
Bronx, N.Y.

Premises: Harlem River and East 135th Street, Bronx, N.Y. Block 2319, Lot 55. Size: 220.34′ x 240.92′ x irregular. 134,100 square feet of industrial water-front land.

Sale analyzes at $2.00 per square foot for land.

6. Canal & 3rd Corp.
140 Lockwood Avenue
New Rochelle, N.Y.

Deed Dated: 5/23/1962
Recorded: 5/24/1962
Liber: 2485, cp 382
Consideration: $ 235,500.00

to

Richard C. & Mary G. Mugler
4611 Arlington Avenue
Bronx, N.Y.

Premises: Harlem River and East 133rd Street and Third Avenue, Bronx, N.Y. Block 2319, Lot 2. Size: 138.15′ x 177.64′ x irregular. 78,577 square feet of industrial water-front land improved with very old buildings.

Sale analyzes at $2.00 per square foot for land.

Exhibit NHI-55

7. Defem Corporation
20 Exchange Place
New York, N.Y.

Deed Dated: 8/9/1955
Recorded: 8/10/1955
Liber: 2140, cp 297
Consideration: $ 365,000.00

to

Providence Produce
Warehouse Co., Inc.
70 East 45th Street
New York, N.Y.

Premises: Harlem River and Lincoln Avenue, Bronx, N.Y. Block 2316, Lot 1. Size: 518.20′ x 430′ x 333.16′ x 241.86′. 133,806 square feet of industrial water-front land.

Sale analyzes at $2.73 per square foot.

8. The N.Y. Central RR.
Company
466 Lexington Avenue
New York, N.Y.

Deed Dated: 10/20/1964
Recorded: 12/22/1964
Liber: 2634, cp 323
Consideration: $2,040,000.00

to

Wembley Realty Corp.
16 Court Street
Brooklyn, N.Y.

Premises: West 230th Street and Ewen Avenue, Bronx, N.Y. Block 5710, Lot, part of 700. Size: 435′ x 680′ x irregular. 900,000 square feet of railroad yard.

Sale analyzes at $2.27 per square foot for land.

Exhibit NHL-55

9. Providence Produce W'hse Co., Inc.
Grand Central Station
New York, N.Y.

Deed Dated: 8/24/1959
Recorded: 10/16/1959
Liber: 2359, cp 13
Consideration: $ 300,000.00

to

Summit Holding Co., Inc.
286 East 137th Street
Bronx, N.Y.

Premises: Harlem River and Lincoln Avenue, Bronx, N.Y. Block 2316, Lot 1. Size: 518.20′ x 430′ x 333.16′ x 241.86′. 133,806 square feet of industrial water-front land.

Sale analyzes at $2.24 per square foot for land.

* * * * *

The appraised property, part of the Oak Point Freight Yard of The New York, New Haven and Hartford Railroad Company, is located in an industrial area of the south east portion of the Borough of The Bronx, New York City.

This property, in a heavy industrial zone, fronts on East 149th Street and the East River and is adjacent to Bruckner Boulevard and Bruckner Expressway, arterial highways which connect with the Tri-Borough Bridge and the New England Thruway. This property is in an excellent location to serve all parts of New York City, Westchester County and Connecticut. Public transportation by subway and bus is two blocks west of the appraised property.

The areas to the north and to the west are heavily populated with an abundance of skilled and unskilled labor, male and female, living within easy walking distance of

Exhibit NHI-55

this property. The area to the east is principally industrial with practically no vacant land available for improvement with industrial structures.

The East River with its deep water, the excellent advertising features of its proximity to Bruckner Expressway, its railroad facilities, and its fine location for labor makes this property most serviceable and desirable for almost any industrial concern.

Parcel No. 1 because of its size and shape, triangular, has only a limited use. The land under water can only be used after being filled in and bulkheaded at great cost. The present upland area does not have sufficient depth along its East 149th Street frontage to be used except for an auxiliary operation.

Parcel No. 2, south of the passway is not entirely level, has various depths to the shoreline, curves along the passway and therefore has a limited use. This portion of the upland is not suitable for improvement with structures unless the land under water is filled in to the bulkhead line.

Parcel No. 2, north of the passway is level and an excellent parcel of industrial land suitable to be improved with any industrial facility requiring railroad facilities.

Exhibit NHI-58

Prepared Testimony of Frank A. Mason a Witness for the New Haven Trustees

—1—

My name is Frank A. Mason. I am a vice president of Meredith & Grew, Incorporated, and my office is located at 125 High Street, Boston, Massachusetts.

Meredith & Grew is a real estate firm founded in 1875 with offices at 125 High Street, Boston and at Constitution Plaza, Hartford, Connecticut. It handles virtually all phases of real estate work throughout New England and elsewhere, including brokerage, appraisals, building management and counseling. The firm's brokerage division is primarily concerned with the sale and rental of industrial and commercial buildings, land, and some residential properties. Its appraisal division has had widespread experience with all types of real estate, and members of its staff have provided expert appraisal testimony in both state and federal courts. Among its many activities, it was retained to review and analyze appraisals of over 3,000 properties involving a total value aggregating many millions of dollars for the Commonwealth of Massachusetts. This review was ordered by the Federal Bureau of Public Roads in connection with the Federal Interstate Highway Program. Recently it completed a similar but less extensive program for the State of Connecticut and is currently engaged in a somewhat similar review for the State of New Jersey. Since 1956, the appraisal division has been particularly

—2—

active in the urban renewal field, having completed appraisals for the cities of Portland, Maine; Manchester, New Hampshire; Boston, Massachusetts; Cambridge, Massachusetts; Gloucester, Massachusetts; New Bedford, Massa-

chusetts; and Worcester, Massachusetts. The Company has also recently prepared two major urban renewal studies. The first of these, entitled "Report on the Land Acquisition Program of the Boston Redevelopment Authority", was prepared for the City of Boston. The second, entitled "A Study of Optimum Land Uses", was prepared for the City of Newton in connection with the City's Community Renewal Program.

In addition to the foregoing, the Company is active in the field of building management. Through its subsidiary corporation, Meredith & Grew Management, Incorporated, it extends its management services to numerous properties of all types including commercial, industrial, and multi-family residential. Among the buildings managed by Meredith & Grew Management, Incorporated, are the Travelers Insurance Company building at 125 High Street, Boston, Massachusetts; Technology Square (jointly owned by Massachusetts Institute of Technology and Cabot, Cabot & Forbes Company), Cambridge, Massachusetts; and Constitution Plaza, Hartford, Connecticut. Other management clients include Northeastern University, Garden Court Apartments Trust, and Massachusetts Institute of Technology.

Augmenting the above divisions is the Company's activity in the field of financing of all types of real estate. As loan

correspondent for the Connecticut General Life Insurance Company of Hartford, Connecticut, Meredith & Grew services numerous loans of substance in both the industrial and commercial fields including the South Shore Shopping Plaza.

Exhibit NHI-58

Since 1953, I have acted as an appraiser and broker for Meredith & Grew. In that capacity I have sold real estate for the Boston and Maine Railroad, including several discontinued stations. In addition, I have appraised real estate for the Boston and Maine Railroad in Massachusetts and new Hampshire, including among other properties, the railroad's terminal buildings at the North Station in Boston, its classification yards in Somerville, and its rights of way from Lynn to Salem, Massachusetts, and from Boston to Melrose, Massachusetts. Other railroad appraisal assignments that I have performed cover the following properties:

1. Land of the Providence and Worcester Railroad in Worcester, Massachusetts, for the Worcester Redevelopment Authority.
2. Land and buildings of the New Haven Railroad, the New York Central Railroad, and the Boston and Maine Railroad in Springfield, Massachusetts, for the Massachusetts Department of Public Works.
3. Right of way of the New Haven Railroad in Falmouth (Woods Hole), Massachusetts, for the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.
4. The Boston Terminal Company's South Station in Boston for the Boston Redevelopment Authority.
5. The New York Central Railroad's Union Station in Worcester, Massachusetts, for the Worcester Redevelopment Authority.
6. Numerous properties of the Massachusetts Bay Transportation Authority in Boston, Brookline, Somerville, and East Boston.

Exhibit NHI-58

7. Rental study of the Boston and Maine Railroad's North Station in Boston for the Massachusetts Bay Transportation Authority.

As a broker I have negotiated sales of real estate other than railroad-owned property in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Quebec.

I have appraised real estate in Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut.

I am a licensed real estate broker in all six New England States, and I am a member of the Greater Boston Real Estate Board, the Society of Industrial Realtors, the Society of Real Estate Appraisers, the American Industrial Development Council, and the Northeastern Industrial Developers Association.

Prior to joining Meredith & Grew, I was employed by the Boston and Maine Railroad in its Real Estate-Industrial Department from 1941 to 1953. In that capacity I was responsible for selling, leasing and appraising railroad property throughout the Boston and Maine system and for

general industrial development along the lines of the railroad. In addition, my activities included negotiations for the sale or lease of privately owned real estate served by or adjoining the railroad in connection with industrial development, and contract negotiations for the construction and operation of private sidetracks thorughout the system.

In my testimony, I will present the results of a study made by my Company and conducted under my personal direction and supervision for the Trustees of the New York, New Haven and Hartford Railroad Company. The purpose of this study was to furnish an opinion of the net liquidation

value of certain real estate of the Railroad hereinafter described. By the term "Net Liquidation Value" I mean the aggregate net recovery value of the real estate which it is reasonable to expect over a projected period, after deductions from the current market value to reflect the cost of holding, managing and selling the real estate during the marketing period. "Market Value" as used herein relating to the schedule of value supplied by the Real Estate Department of the Railroad and reviewed by us is defined as follows: "The highest price estimated in terms of money which a property will bring if exposed for sale in the open market, allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted

—6—

and for which it is capable of being used."

The property covered by our analyses involves all of the real estate of the Railroad (less certain areas described below as exceptions) as follows:

	Acres	*Number of Buildings*
Massachusetts	8,384.95	8
Rhode Island	2,206.36	1
Connecticut	11,539.81	9
New York	2,833.21	1
Total	24,964.33	19

Excepted from the overall property of the Railroad as relates to this report are the following:

1. Any interest the railroad may have in Grand Central Terminal properties;
2. The so-called Harlem Division in the State of New York;

Exhibit NHI-58

3. Property of the Boston and Providence Railroad Corporation, Providence and Worcester Railroad Company, Norwich and Worcester Railroad Company, Holyoke and Westfield Railroad Company, South Manchester Railroad, and property of other affiliated companies.

4. Property in Springfield, Massachusetts from Elm Street north to the interchange with the New York Central Railroad;

5. Property in Falmouth, Massachusetts from Nobska Road westerly to the end of the line at Woods Hole;

6. Property in New Bedford, Massachusetts from Maxfield Street south to the end of the line.

—7—

Our estimates were prepared taking into account the following assumptions that we were informed underlie the Railroad's liquidation study:

1. That all common carrier operations on the Railroad would have ceased.

2. That all real estate tax exemptions or concessions for which the Railroad now qualifies by virtue of its status as an operating railroad would be no longer in effect.

3. That approvals of individual sales by the Reorganization Court would still be required.

4. That the present staff of the Railroad's Real Estate Department would be utilized to the extent possible in progressing and concluding sales transactions. To the extent that this staff would not be able to handle the volume of work involved in liquidation, outside assistance would be retained.

Exhibit NHI-58

5. That the schedule of removal of tracks would be as estimated by the Railroad's staff.

6. That no sales of rights of way, etc., for use for railroad or mass transportation purposes are to be assumed other than in those limited areas where Massachusetts Bay Transportation Authority now holds options.

7. That this report covers real estate only, except in the case of three sections of right of way on which the Massachusetts Bay Transportation Authority now holds priced options, covering not only land but also tracks and other railroad appurtenances.

8. That purchasers will obtain their own financing.

In the preparation of this study, I utilized the talents and experience of several members of the Meredith & Grew staff, including the President, Thomas M. Horan, the Executive Vice President, Joseph C. Skinner, and others. Principal among these was my colleague Mr. John E. Connolly who assisted me generally in the overall assignment, but whose principal function was to work with me in reviewing the estimates of value prepared by Witness B. W. Thompson. Mr. Connolly has been with our Company since 1962 and has a broad educational and professional background in the real estate field, particularly in the area of appraisals. Among the many tasks he has performed for the Company have been assignments as a review appraiser in connection with the Company's work with respect to the Federal Interstate Highway Program in Massachusetts, Connecticut, and New Jersey to which I have previously referred.

In our opinion, a review of Mr. Thompson's valuation estimates was necessary to determine their reasonableness

before we could properly develop an estimate of net liquidation value. In the conduct of this review, extensive investigations were made as to the current range of values in numerous communities, particularly those where relatively

—9—

high values were indicated. These investigations included consultations with real estate brokers, appraisers, managers, and others who are knowledgeable in the field of real estate values. Plans showing the limits of the railroad's ownership and topographical maps were reviewed, and a number of on-site inspections were made. Frequent discussions with Mr. Thompson and his staff occurred when specific questions arose. As a result of our review, it is our conclusion that the valuations estimated by Mr. Thompson are within a reasonable range of Market Value and that the aggregate amount constitutes a reasonable representation of the total Market Value as of December 31, 1965.

In arriving at an estimate of a liquidation period, it was considered that a reasonable liquidation would involve numerous sales to numerous buyers over a period of years. Recognizing that the Railroad's track removal program would require some three years to accomplish and the large amount of land involved, it is our opinion that liquidation of the major portion of the real estate covered by our study would require at least five years for completion, with an additional year for disposal of the least salable property. This estimate of a six-year disposal period is on the low end of what we would consider to be a reasonable range of years to expect such a major undertaking to require. In that regard, we are aware that in an earlier study in 1964, the Railroad's staff estimated that liquidation would require some ten years for completion. Such an estimate is not

—10—

in our view unreasonable. We recognize that the negotiation

and consummation of sales contemplated by this study would be a very considerable task, requiring the effort of many trained people and a number of time-consuming steps. We also recognize that an accelerated sales program, even if physically possible, might only be accomplished in practice by sacrificing in part the total consideration that might otherwise be achieved. We have nevertheless proceeded to estimate the net liquidation value using a six-year disposal period, fully aware that such a period may very well be optimistic.

In arriving at this estimate of a six-year overall projection, the parcels valued separately by the Railroad were regarded with respect to their general marketability and with respect to their availability based on the track removal program. Based on these considerations, estimates were made as to the length of time required to market the various parcels and to complete conveyances as expeditiously as possible.

In connection with marketability, the parcels delineated by the Railroad are not regarded as representative, in all cases, of the most marketable separations of the property. No detailed marketability and reuse plan of the entire property was developed but, from tests made in various communities, we believe that any change in parcel delineation, for the purpose of more clearly defining marketable parcels, would have no significant effect on the number of sales

involved or on the aggregate valuation of the property.

The estimates of net liquidation value under an assumed six-year period of disposal considered certain principal areas of cost related to the holding and sale of the properties involved. Since costs for legal expense and protective services were considered by the Railroad's staff and re-

ported to Mr. Gordon they were not reflected in our computations. Items included in our study are real estate taxes during the period from December 31, 1965, to the date of sale, brokerage and promotion expenses, expenses of the Railroad's Real Estate Department in the administering of the sales program, the cost of appraisals and of transfer taxes, and an estimate for contingencies. Our study does not reflect any taxes unpaid as of December 31, 1965, that would have to be paid at or before the time of conveyance nor does it include any taxes applicable to buildings scheduled for demolition during the liquidation period.

With respect to taxes subsequent to December 31, 1965, our estimates are based in part, as previously noted, on the assumption that the Railroad would no longer be operating and, therefore, not qualified for the usual railroad tax exemptions and concessions. Under the circumstances, local real estate taxes are considered to be applicable to all the property. In the absence of actual assessments on all parts of the property, a tax load has been estimated based on the market value developed by the Railroad, and subject to tax

rates which have been estimated as indicative of the rate which would be applicable to that market value.

The resulting estimate of tax costs by years was as follows:

Year	*Tax Cost*
1	$2,872,531.69
2	1,608,940.77
3	869,918.25
4	500,546.36
5 & 6	324,811.92
Total	$6,176,748.99

Exhibit NHI-58

Our estimate of the cost of sales during this period takes into consideration, as mentioned previously in my testimony, that the Railroad will maintain a real estate and engineering staff to process sales during the liquidation period. Based upon the past performance of this staff which has been handling approximately 175 sales per year plus other duties, we estimate that this staff could handle approximately 250 sales per year at a cost of about $1,200 per sale, if not required to perform other duties. Sales in excess of that number which are expected to be completed each year under the projected liquidation program, would require additional outside services at an additional cost or amplification of the Railroad's staff.

In view of the extent of the liquidation undertaking, the services of many real estate brokers would undoubtedly be required, particularly if liquidation within six years is to

—13—

be even an optimistic possibility. We estimate that ninety percent of the value of the property would be sold by real estate brokers at an average commission rate of six percent of the gross sales price.

Willing buyers for portions of the property at the values estimated are not anticipated during the six-year period, due to such factors as isolation of such properties from highway access and inaccessibility from adjoining land because of the grade of the terrain. The salability of some portions is limited by virtue of their having a market likely to be restricted to only one or two adjoining owners. These parcels would be difficult to sell and would move slowly, yet they represent a tax cost until sold. At the same time they may have a speculative market at a substantial discount from what would be otherwise considered a fair mar-

ket price. In order to assure disposition of this type of property within the assumed liquidation period, and to eliminate the tax burden, their value has been discounted substantially from the market value of $11,177,632.69, reported by the Railroad, to $3,000,000. It was assumed that this property would be sold at discount in the fifth and sixth years. In this connection it was also considered necessary to consolidate these parcels into 300 larger than usual segments in order to reduce selling costs, and actually to effect the final disposition of the property. Such segments would represent approximately five miles of right of way each.

A credit was made for rental income during the holding period. It was estimated that the present rental income would be reduced almost immediately by the termination of

rail operatiaons and the removal of buildings, and that by the end of the fifth year all rented properties would have been sold. Giving consideration to the Railroad's rental income generally and to the foregoing factors, it is considered that not more than 1.4% per year of the value of property unsold would be earned with the following results:

Year	*Rental Income*
1	$1,000,000
2	750,000
3	350,000
4	100,000
5 & 6	50,000
Total	$2,250,000

Exhibit NHI-58

Appendix A attached hereto summarizes the results of the foregoing analysis. As indicated therein, it is estimated that with an assumed minimum disposal period of six years the property under study, which has a total estimated market value of $79,113,000, would produce a net liquidation value of approximately $67,300,000. These net proceeds would be received over the six-year period. The foregoing figures do not attempt to restate the value of such proceeds on a present-worth basis as of the liquidation date of December 31, 1965. Such a restatement would, of course, reduce the amount of net liquidation value.

Exhibit NHI-58

SALES Year	No.	MARKET VALUE Land	Buildings	Total	Rental Income	Total Expenses*	Net Liquidation Value
1	141	$16,365,981.80	$2,850,000.00	$19,215,981.80	$1,000,000	$ 4,534,252.84	$15,681,728.96
2	427	32,149,151.23	1,225,000.00	33,374,151.23	750,000	4,374,271.97	29,749,879.26
3	346	12,598,683.44	90,000.00	12,688,683.44	350,000	2,321,668.20	10,717,015.24
4	473	10,834,816.10	—0—	10,834,816.10	100,000	1,910,845.36	9,023,970.74
5&6	300	3,000,000.00**	—0—	3,000,000.00	50,000	911,265.92	2,138,734.08
	1,687	$74,948,632.57	$4,165,000.00	$79,113,632.57	$2,250,000	$14,052,304.29	$67,311,328.28

Witness: Frank A. Mason
Appendix A
Sheet 1 of 2 sheets

*Does not reflect legal or protective expenses, or unpaid taxes through December 31, 1965.

**After Discount. ($11 + before disc.)

Exhibit NHI-58

EXPENSES

Real Estate Taxes	*Real Estate Department*	*Brokerage & Promotion*	*Appraisals*	*Transfer Taxes*	*Contingency*	*Total Expenses*
$2,872,531.69	$ 169,200	$1,137,622	$ 70,000	$ 34,899.15	$ 250,000	$ 4,534,252.84
1,608,940.77	512,400	1,852,204	110,000	40,727.20	250,000	4,374,271.97
869,918.25	415,200	710,188	60,000	16,361.95	250,000	2,321,668.20
500,546.36	567,600	610,080	18,000	14,619.00	200,000	1,910,845.36
324,811.92	360,000	172,000	—0—	4,454.00	50,000	911,265.92
$6,176,748.99	$2,024,400	$4,482,094	$258,000	$111,061.30	$1,000,000	$14,052,304.29

Witness: Frank A. Mason
Appendix A
Sheet 2 of 2 sheets

Exhibit NHI-62

Prepared Testimony of Ora C. Roehl a Witness for the New Haven Trustees

—1—

STATEMENT OF ORA C. ROEHL

I am Ora C. Roehl. I reside at 100 Memorial Drive, Cambridge, Massachusetts. I have my office at 607 Boylston Street, Boston, Massachusetts.

I was graduated from the University of Wisconsin in 1928 with a BA degree. Following graduation, until 1941, I was employed by Wisconsin Public Service Corporation and other companies associated with Wisconsin Securities Company. I held various positions including those of Research Engineer and Assistant to the President.

From 1942 through 1946 I held various positions in the Navy Department in Washington. These included Special Assistant to the Chief of the Production Branch of the Navy, Chief of the Aircraft Production Advisory Staff in the executive office of the Secretary of the Navy; Executive Secretary of the Committee on Aircraft Materials Research for Army, Airforce, Navy, and National Advisory Committee for Aeronautics and Office of Scientific Research and Development; and Navy Aeronautical representative on Foreign Technical Intelligence Committee.

From 1946 to 1961, I was associated with Keystone Custodian Funds, Inc., in Boston. I held various positions and was Executive Vice President during my final three years with this firm.

Since 1961 I have had my own consulting firm on financial and management affairs. This has involved financial planning, advice on acquisitions and mergers, and invest-

—2—

ment management and organization studies for financial

institutions. During this period I have been adviser to and Chairman of the Investment Committee of Empire Trust Company, and consultant to various insurance companies, investment companies, investment banking concerns and business corporations. I am a Trustee of New England Gas and Electric Association and a Director of True Temper Corporation.

I have been requested by the Trustees of the New Haven Railroad to prepare a study of the value of the common stock and the bonds of the merged Pennsylvania-New York Central Systems to be received by the New Haven Railroad in payment for assets sold to the new merged company, the Pennsylvania New York Central Transportation Company.

Two valuation estimates will be developed, one relating to the value shortly after the merger of the Pennsylvania and New York Central has been consummated, and the other covering the value of the securities after sufficient time has elapsed during which the benefits of the merger can be secured. I have assumed that this would be approximately five to eight years.

There is, of course, only one "actual value" for any common stock or bond at any given time, and that is the price at which a trade is actually made. This price can be higher or lower than the last price quoted on the various stock exchanges in the case of listed securities. The price that an investor is willing to pay depends on the long range

attractiveness of the company whose securities are being traded and on the overall investment climate. Put simply, the latter factor involves the state of the common stock market (bullish or bearish) and the state of the bond market (easy or tight money).

Exhibit NHI-62

Securities are generally purchased by investors, as distinguished from traders, for longer term investment. Therefore, they are concerned not only with the price at which a security can be purchased today but, more importantly, with what they expect a given security may be worth in the years ahead. They are also concerned with marketability, and whether the security fits their investment needs and objectives. The marketability of both the Pennsylvania and New York Central common stocks is excellent. There were, for example, two successful secondary offerings in July, 1966 in which a 403,700-share ($20,033,612) secondary offering of Pennsylvania was quickly sold at $49.625 per share, and a 66,400-share ($4,407,300) offering of New York Central was oversubscribed at $66.375 per share.

I shall approach the evaluation of the Penn-Central securities from the point of view of the investor. I shall evaluate the price potential of the securities as would a portfolio manager who is faced with the decision as to whether or not he should approve the purchase of a security being recommended by the security analysts.

I will first address myself to an evaluation of the Penn-Central common stock, and then review the mortgage bonds.

—4—

The principal factors that affect the price of a common stock are its present and future earnings and dividends. The potential that exists for future earnings and dividends determines to a great degree the price-earnings ratio at which a stock sells. The ratio will be high for stock with great expectations.

The industry itself in which the company is engaged has a great deal to do with the investment attractiveness of the company. For example, the office equipment com-

panies as a group have for many years been favored by investors, whereas companies in other groups such as the cement industry have generally been considered much less attractive. The railroad industry for many years has been of marginal attractiveness. In recent years investors have begun to appreciate that a change may be in the making in the railroad industry, and the rail stocks have gained in general acceptance.

Before examining the earnings, dividends and price of Penn-Central, some highlights of the rail industry should be reviewed so as to determine why the industry has become attractive to investors in recent years and why it appears to hold promise for the future.

The reasons for the increasing attractiveness of the rails as investments are readily visible. Net operating revenue is up, passenger miles are down, and freight losses have been arrested. Whereas gross revenues rose only a little over 2% during the period 1961-1965, net income rose from $385 million to over $800 million—well over 100%. In 1966, net income of the Class I rails will approach $900

million, a figure exceeded only twice in the last fifteen years, and not since 1955. The possibilities for future railroad industry gains seem to me to be bright.

Against this improving background, railroad equities have been outstanding performers. The Dow Jones rail average rose from 114.23 in July, 1962 to 274.33 in February, 1966, or for a gain of 140%. This compares with a gain for the Dow Jones Industrial Average for the same period of 90%.

By March, 1965, railroad securities had become sufficiently popular with institutional investors for the Penn-

sylvania to be returned to the "Vickers Favorite 50" in 48th place. The "Favorite 50" lists the stocks most popular with professional investment management. Standard Oil of Indiana was 46th, Caterpillar Tractor 47th, Westinghouse 49th and United Airlines 50th. The Vickers Report of June 30, 1966, however, showed that the Pennsylvania, because of the decline in the price of its stock, was no longer in the top 50, although still held by 51 investment companies.

Since February, 1966, there has been a general decline in the rail average. The reasons for the drop were twofold. One, the general market decline and second, the delays that have occurred in making effective pending rail mergers.

While the merger uncertainties and the decline in the stock market generally have had their impact on stock prices, railroad earnings have continued to improve and 1966 will exceed the excellent 1965 year. For example, the

Pennsylvania's consolidated earnings for the third quarter of 1966 increased nearly 28% compared with 1965. The New York Central's consolidated earnings record for the nine months has not been published but its rail earnings showed a gain for the period of 37.6%.

While the market for railroad securities has shown a decline, the railroad renaissance is still with us and will be with us for some time as the country faces up to its transportation problems.

The problems that the government and the industry face in trying to improve the nation's transportation facilities are still only being inventoried and listed and are far from being solved. Recently Alan S. Boyd was selected to head

the new Department of Transportation. He is quoted as saying that it is going to take a year for a "shake down" and then a year to tie all the loose ends together before "we can drop the bomb".

When he signed the bill setting up the Department of Transportation, President Johnson pointed out that the demand for transportation will double during the next two decades and said,

> "We are already falling behind. Our lifeline is tangled. We are confronted by traffic jams, by commuter crises, by crowded airports and crowded air lanes, screeching airplanes, archaic equipment, safety abuses, and roads that scar our nation's beauty."

Transportation, which consumes one out of every five dollars spent in the United States, is finally being given long needed attention.

Indicative of the attention the industry is receiving is the high speed ground transport (HSGT) study started by

—7—

the Department of Commerce in 1965. Under the High Speed Ground Transportation Act, $18.5 million was appropriated for use in the fiscal year 1966 with Massachusetts Institute of Technology and other research organizations undertaking fundamental technical and economic studies. These studies are aimed principally at the 450 mile Northeast Corridor area, extending from Boston to Washington, D.C, and containing nearly 40 million inhabitants.

Funds of $5 to $8 million dollars are also to be allocated to a much needed Transportation Statistics Program aimed at coordination of transportation data that are being gen-

erated by a great multitude of federal and local agencies. There is a lack of good data on demand, origin-destination, trip purpose, induced demand, modal split and other factors, without which new transport systems cannot be matched to the needs of a given region.

The HSGT program will expend about $58 million on technology studies (from which new systems will result), about $6 million on the rail test track, $5 million to $8 million on the statistics program, and about $18 million on improving the existing rail system in the Northeast Corridor.

While the amounts being spent are small compared to the magnitude of the program, a beginning has been made. Again to quote President Johnson,

> "A day will come in America when people and freight will move through this land of ours speedily, efficiently, safely, dependably and cheaply. That will be a good day indeed, a great day in America. Our transportation was built with the genius of free enterprise. As
>
> —8—
>
> long as I am President, it will be sustained by free enterprise."

The ups and downs in the market for rail stocks this year do not presage a decline in our nation's efforts to meet its transportation needs.

The delays are frustrating, but the job to be done is too fundamental to national welfare and defense to allow anything to change the basic course of events.

There will, of course, continue to be periodic declines in the stock market and in general business. In fact, it would

not be surprising if the railroad industry finds it difficult in 1967 to duplicate its good 1966 results. The railroad industry and the Penn-Central System are cyclical and their good performance will be affected by business trends, especially in the steel and auto industries.

1967 could well be, as some economists have described it, "a non-vintage year for the economy". This possibility is being discounted in the market at the present time and is one of the reasons the Pennsylvania stock is down to 53 from its 1966 high of 73, and the New York Central stock is down to 69 from its high of 89.

While the uncertain business outlook is affecting the rail industry, the wage settlement and remaining negotiations are important negative factors. It appears that the increased wage bill still to be negotiated for the industry may add as much as $300 million to the wage cost.

—9—

Formidable as these current problems may be, they do not nullify the longer range potential for growth and improved operating results that will accrue to the rails once the pending mergers are completed. I believe that the potential for increased productivity to offset wage increases, the availability of increased tonnage, the technological developments ahead and the trend of increased earnings will make rails a most attractive investment in the next five years to ten years.

Concluding my highlight review of the railroad industry's future potentials, I agree with the forecast made by others that within the next ten years, the rails should operate one trillion ton-miles, with ton-miles increasing upwards of 3% annually, have gross revenues increase by possibly

Exhibit NHI-62

$4 billion and carry about 30% of this increase down to net income.

As one reviews the accomplishments of the railroad industry during the past five years and considers the potentials that lie ahead to help meet the nation's transportation needs, the investor must come to the conclusion that the industry warrants a longer term "Above Average" Investment Rating, even though 1967 may see an interruption in the good gains of 1965 and 1966. This longer term above average rating will become more evident as the Penn-Central demonstrates by actual performance what can be done for its shareholders and for the economy of the areas it serves.

The Pennsylvania and New York Central Common Stocks—recent earnings and market trends.

The earnings achievements of both the Pennsylvania and

New York Central in recent years have been outstanding. For the Pennsylvania, 1965 was the best year since 1956, with consolidated system earnings of $5.06 compared to $4.37 for 1964. New York Central's consolidated earnings were $7.64 in 1965 vs. $5.34 in 1964.

Earnings for 1966 have continued the favorable trend. With earnings for three quarters reported it appears that the Pennsylvania's consolidated earnings could be as much as $6.25 and the New York Central's 1966 consolidated earnings could exceed $10.00 per share.

Here is the high-low price performance record for 1962 and 1965 and 1966 to date along with the December 12, 1966 price records.

Exhibit NHI-62

	1962	1965	1966	Price on 12/12/66	% Gain 1962 Low-1966 High
Pennsylvania	19–10	65–35	73–40	53	630%
New York Central	21–11	81–41	89–52	69	700%
Dow Jones Rail Average	151–114	250–185	274–182	209	140%
Dow Jones Industrial Average	727–525	970–833	1001–736	821	90%

The percent gains are not too meaningful but they do indicate the volatility of the rail stocks and illustrate the market potentials that exist at certain times in rail securities.

Many investors do not realize how well the railroad stocks have really performed. To illustrate this, it is interesting to look at a list of securities that have per-

formed well for the five year period September 1, 1961 to September 1, 1966—a period when the Dow Jones Industrial Average showed a gain of only 11%. The Pennsylvania more than held its own with many companies on this list. The airlines reflected the great growth in their part of the transportation business by showing the best gains.

Exhibit NHI-62

30 Performers	*1966 Sept. 30 Price*	*Sept. 1961 to Sept. 1966 5-year gain (%)*	*5-year % up from low*
ACF Industries	40	205	325
American Airlines	54	131	250
Avon Products	77	148	284
Boeing	51	119	234
Burlington Mills	31	199	266
Burroughs	77	115	249
Capital Cities Broadcasting	26	203	428
Columbia Broadcasting Sys.	55	241	299
Control Data	35	386	662
Delta Air Lines	93	948	1,553
Eastern Air Lines	69	155	334
Grumman Aircraft Engineer.	42	142	187
Intl. Minerals & Chemical	56	152	228
Litton Industries	64	127	268
Magnavox	49	182	502
Merck	72	154	258
National Airlines	67	893	1,240
Northwest Airlines	93	1,418	2,225
Pan American World Airways	51	406	533
Pennsylvania R.R.	46	208	346
Polaroid	138	167	577
RCA	42	152	267
Standard Oil (Ohio)	64	152	191
Syntex	73	1,110	1,110
Textron	46	264	326
Trans World Airlines	59	269	638
Union Oil of California	52	169	288
United Air Lines	51	181	467
Whirlpool	40	159	207
Xerox	175	629	1,183

Source: F. N. Kiamle, quoted by R. H. Stovall.

—12—

Turning to relative market performance, for the period from 1955-1962, the Pennsylvania and New York Central performance record did not keep pace with the Dow Jones Industrial Average. However, from mid-1962 to early 1966, the performance record has far out-performed the average.

Exhibit NHI-62

After a somewhat poorer than average performance for the first three quarters of 1966, the relative performance has again moved upward in the last quarter.

The Common Stock of the Pennsylvania New York Central Transportation Company.

As we do not yet have a market price for the new Penn-Central common stock, I have estimated a price for December 1966, as follows:

Shares of stock outstanding (end of 1965)

Pennsylvania	13,883,000
New York Central	6,880,000

Shares to be outstanding

Pennsylvania	13,883,000	
New York Central	8,944,000	(6,880,000 × 1.3)
Total Penn-Central	22,827,000	

Earnings (consolidated)	*1965*	*1966 Estimate*
Pennsylvania	$ 70,100,000	$ 83,300,000— 86,800,000
New York Central	53,400,000	68,900,000— 70,500,000
Total Penn-Central	$122,500,000	$152,200,000—157,300,000

—13—

Earnings, per share	*1965*	*1966 Estimate*
Pennsylvania	$5.06	$ 6.00— 6.25
New York Central	7.64	10.00—10.25
Penn-Central	5.37	6.70— 7.00

Market Price and Dividend as of December 12, 1966

	Price	*Market Value*	*1966 Dividend*
Pennsylvania	53	$733,000,000	$2.30 ($2.40 rate)
New York Central	69	$475,000,000	$3.15

Combined System—using above December 12, 1966 data

	Market Price	*Dividend*	*Dividend Rate*	*Price/ Earnings Ratio*
Penn-Central	53	$2.50	4.7%	8×

Exhibit NHI-63

I have used the above procedure in determining a value for the Penn-Central rather than just taking the market value of the Pennsylvania stock as both stocks have not always sold at merger parity. In addition, the New York Central dividend is currently at a somewhat higher rate, although the stocks on December 12, 1966 were selling at about merger parity. In view of the $2.40 dividend rate for the Pennsylvania and the recent increase in the Central rate, I have estimated that the dividend for the Penn-Central System could be $2.50.

Neither the Pennsylvania price nor the estimated price above can really be said to be a Penn-Central price. Previously, when announcements favorable to the proposed merger have been made, such pronouncements have also favorably affected the stock. Given a good market atmosphere, the actual merger announcement should result in

an almost immediate increase in stock values. A 10% increase would be a conservative estimate, and if the market were in an exuberant mood, the increase could quite quickly be 10 or 15 points, or somewhat over 20%. Even such an increase would result in a price considerably under the market highs of 1966.

The crux of the valuation, however, lies in future earnings. What earnings performance can the Penn-Central System produce? The market price of the common stock at the time of the merger will begin to give some weight to estimated merger savings and future growth potentials, but the price of the stock five or ten years from now will be dependent on actual results during the interim plus a weighing of the outlook for 1972 to 1975.

Exhibit NHI-62

Many articles have been published on the contribution that the merger will make to the nation's economy and many dollars and cents estimates have been made as to merger savings. Most of these estimates are significantly higher than the figures I shall use. For the purposes of this evaluation I have used the estimates actually made by the managements of the two roads.

These savings have been estimated at $81,000,000. The record in the case indicates that almost $74,000,000 of these savings will be effective after about the fifth year and it has been indicated that the full $81,000,000 of savings should accrue yearly in eight years. With the amount of stock currently outstanding, and assuming that the System will pay no income taxes, these savings should approximate

$3.25 a share five years hence and over $3.50 a share in eight years.

At this point we should consider the fact that the Penn-Central is to purchase the assets of the New Haven and that one of the considerations will be 950,000 shares of common stock. We have estimated that Penn-Central prior to the New Haven acquisition will have 22,827,000 shares of stock outstanding. The issuance of 950,000 shares would increase the outstanding stock to 23,777,000 shares. If the Penn-Central were to find a way to pay the New Haven in treasury stock then, of course, there would be no dilution. Otherwise, the dilution would be about 4.2%.

Taking a closer look at the merger savings, I have tried to determine what earnings an investor might have reason to expect from the Penn-Central in the years ahead. In arriving at these figures I have made my calculations sufficiently conservative so as to allow for the possible dilution that may occur from the acquisition of the New Haven.

Exhibit NHI-62

Earnings in 1966 for the Penn-Central System, if it were in operation today, could be reported at about $6.50 to $7.00 per share. The higher figure appears more likely as of this time. I have used a $6.70 figure.

Five years hence, in 1972, without assuming any growth, but assuming that Penn-Central could do as well in its general business activities as it did in 1966 ($6.70 a share), and taking into account the merger savings of $3.25, there should be effective earnings which could easily approach $10.00 per share.

—16—

In fact, I imagine that both Pennsylvania and New York Central in their own five year plans are budgeting for substantially higher goals. A $10.00 estimate, in my opinion, is very conservative.

Dividends might well be $3.40-$4.00 per share. These dividend estimates may be considered low by some, but if the Penn-Central grows as I expect it to do then management may find it in the stockholders' interest to plow earnings back into the company rather than pay them out in taxable dividends. This is a practice generally followed by growth company managements.

There is, of course, always the possibility that the United States may enter into a serious depression within five years, but such a possibility is not expected by me or the majority of governmental and business economists. For the purposes of making a reasonable judgment of the present (1967) and possible future (1972-1975) value of Penn-Central common stock, I have assumed that no serious depression is around the corner and that whatever recession may be encountered will have spent its force by 1972.

Exhibit NHI-62

It is, however, pertinent in this regard to point out that Penn-Central with the merger benefits ahead of it should do relatively better in a recession period than other companies which do not have such a basic opportunity for built-in savings ahead of them.

In making the foregoing earnings estimates, I have estimated current earnings and have arrived at an estimate for 1972 assuming no growth in general business with merger

savings accounting for all the earnings gain. However, possible income growth from general operations must be considered.

What is a reasonable estimate for growth for the U.S. economy and for Penn-Central during the next five years?

I believe that it is reasonable now to assume, particularly with our population and other growth trends, that GNP will be 20% higher in 1972 that it is at present. I also believe that a reasonable estimate for growth of Penn-Central consolidated earnings for the next five years will fall within a range of 20% to 50%.

Using a present basic 1967 earnings potential for the System of $7.00, we estimated that the 1966 actual figure was $6.70, every 10% gain would be 70¢ a share. A 20% gain would mean earnings of $8.40 plus $3.25 of merger savings or $11.65 in 1972, while a 50% gain would mean $10.50 plus $3.25 of merger savings or $13.75 per share. With merger savings approaching $3.50 by the end of 1972 earnings could reach $14.00 per share.

I believe that a reasonable earnings estimate in 1972 is in a range of $12.00 to $14.00 per share. By 1975, additional merger benefits and further gains through improved rail

Exhibit NHI-62

and non-rail operations earnings could well approach $15.00 per share. The 1965 rate of return on the System's investment in transportation property of close to $4 billion was 2.41%. The average industry rate of return is about 4% with certain roads, of course, enjoying much greater returns. Granted that Penn-Central has a great task ahead

of it to improve its railroad rate of return, the potentials are there. By 1975, some of the non-rail operations should also be showing substantial results, so I feel my 1972-75 estimate of $12-14 is reasonable.

I have mentioned earlier that I thought dividend payments could well be limited as management will most likely find many opportunities for growth investment. Under such favorable growth conditions dividends might well be limited to a 40% payout and reach about $6.00 a share in the 1972-1975 period. Such a development under such circumstances would not be a negative factor for the common stock.

The Penn-Central Common Stock Price Earnings Ratio.

A correlative to the outlook for earnings is the price earnings ratio that investors may be willing to pay for the Penn-Central stock.

The price earnings ratio of a stock is dependent on many things other than just current earnings and dividend performance. Factors such as the outlook for the railroad business, the quality of management and the Penn-Central's non-railroad diversification activities all have an important bearing on the price earnings ratio. It was pointed out earlier that the investors will pay a higher price earnings ratio for a company with good industry growth prospects,

Exhibit NHI-62

and I believe that Penn-Central will be in that category. Apart from the general industry considerations, I think there are definitely plus factors in the Penn-Central man-

agement and diversification activities that will give the stock a higher than average price earnings ratio.

Penn-Central's excellent management team has demonstrated impressive qualities of leadership.

Mr. Saunders was president of the Norfolk and Western when it undertook the first important railroad merger in decades. He headed a staff which achieved the bulk of their estimated merger savings well ahead of schedule. At the Pennsylvania, Mr. Saunders has led in developing an aggressive diversification program which has had a most wholesome effect on the Pennsylvania non-railroad earnings.

Mr. Perlman has directed Central's "quiet revolution" in management techniques. As Mr. Perlman puts it,

> "We stress profit, not just volume gains in operating revenues. Central's cybernetic, marketing and technical research points us where the profits are. Then our young and energetic management team employs the best techniques to gain a good return on investment. This is what we mean by a total systems engineering approach that, through intensive research, allows us to consider every aspect of our operations in each service area."

This is the kind of management for which shareholders are willing to pay a premium. About ten years ago in speaking at the Annual Meeting of the American Petroleum Institute I said,

Exhibit NHI-62

"Superior management is generally evaluated at 30 to 35 per cent higher in the securities market place over average management; good management is worth at least 15 to 20 per cent more than the average. The poorly managed company can only struggle for its very existence."

Nothing has happened in the interim to change my opinion.

—20—

If anything, I would assign higher ratings today.

Another management factor that is given great weight by investors today is a management's success or failure in diversification efforts.

Diversification to stabilize and increase profits is a major factor in the long range plans of most leading American companies. Many companies, in fact, owe their viability to their successful diversification efforts. Railroad companies have for some years been aggressively entering other fields of business, including such activities as real estate, trucking, warehousing, oil, pipe lines, timber leasing, and chemicals.

Penn-Central, with its real estate holdings and activities in New York, Philadelphia, Los Angeles and other cities, its holdings of the Great Southwest Corporation, Arvida, Buckeye Pipe Line, Strick and other companies, is no laggard in its efforts to diversify into profitable non-railroad enterprises. It would appear that only the beginning has been made and that as funds become available from earnings or from the sale of railroad stock investments, such as N&W, that additional diversification will be made. This should further stabilize and increase the company's earnings.

Exhibit NHI-62

How does one put a value on these management factors in weighing the price of the company's common stock? One can say that before merger these factors were reflected in the respective Pennsylvania and New York Central price earnings ratios. It is my opinion, however, that these

management factors will find a much higher evaluation in the price earnings ratios that will be assigned to the merged system.

Even here they will not be fully reflected for some time, and then only as management demonstrates its performance abilities. As the contribution to earnings from the Penn-Central's management ability and its diversification efforts becomes more visible and as the capital values of the real estate holdings of the System become understood, the price earnings ratio of Penn-Central will increase substantially.

The price earnings ratio today is about 8. This is an estimated figure developed before the merger has become effective. The price earnings ratio will, I believe, improve on approval of the merger.

The price earnings ratios for the Pennsylvania and New York Central at the February, 1966 market highs, using 1965 earnings, were 14X and 11.6X respectively. The present ratio of 8, in my opinion, has discounted the problems of whether and when the merger saving will be realized.

What will the price earnings ratio be and what could or should it be?

I expect, on the basis of the factors just discussed, that in 1972 the Penn-Central stock will command a price earnings ratio or multiplier of between 12 and 14. In view of

the high price earnings ratios that the individual companies

commanded in early 1966, I believe that the range of 12 to 14 in 1972 is conservative.

Such a price earnings ratio applied to my previous earnings estimate for 1972 of $12 to $14 would indicate an estimated fair market value at that time for the stock of Penn-Central as follows:

12 × $12.00 = $144.00	12 × $14.00 = $168.00
14 × $12.00 = $168.00	14 × $14.00 = $196.00

At first glance this range may seem on the high side and not attainable. However, as one looks at the past performance of the merged companies, I consider it wholly reasonable. [It represents a gain of 200% over the present price but it is only about twice the price at which the individual stocks sold in 1966.]

It must be recognized that the above estimate is based on good business in 1971 and 1972 and with a favorable business outlook for 1973. That such a condition will exist cannot be treated as a certainty. However, I see no danger to this estimate which is based on moderate growth in our economy.

While I have made actual dollar price estimates, the question of "relative investment performance" must also be weighed. One must assume for this purpose that the investor will have his money actually invested and, obviously, the performance of Penn-Central cannot be considered without weighing the anticipated performance of other common stocks. The above figures assume that the stock

market itself has moved up and that the Dow Jones averages are above their previous highs.

—23—

If that turns out not to have been the case, one must give more weight to the relative performance. Are the potentials of Penn-Central such that its common stock can be expected to perform better than average in a "not so robust" market or in a "down" market?

In my judgment, it can be so expected to perform. Merger benefits should accrue to the company in the next five years even though the economy as a whole may not have shown any marked increase. Under these conditions the common stock of the Penn-Central should continue to show the "better than average" performance record the Pennsylvania and New York Central have shown over some years.

All of my earnings estimates are based on "no tax" liability. It may be, if the non-rail earnings of the company develop as we expect them to do, that Penn-Central will need to begin to think about paying taxes in the 1972-1975 period. Sufficient information is not available to weigh properly this question, but if it does turn out to be a factor, it should be considered a favorable development. The company is in business to make money for its shareholders and if the company makes enough money so as to pay taxes, so much the better.

In Summary.

It appears to me that it is reasonable to conclude:

(1) The outlook for the railroad industry on its own

—24—

efforts is bright. If government agencies involved with the nation's transportation problems develop and promote an

imaginative program to weave the railroads into their proper place in the nation's transportation system and to give them some of the benefits now granted other forms of transportation, the outlook could be even brighter.

The odds appear good that governmental action will be forthcoming. The administration has taken some constructive action and the "transportation jam" in which the nation finds itself requires and demands action.

I expect the Penn-Central System to operate within a regulatory and business climate much more favorable than has existed in the past.

(2) The Pennsylvania and New York Central have each demonstrated a real ability to apply new management techniques to railroading. Substantial progress has been made. The trend in both companies has been toward greater efficiency in the railroad and non-railroad operations. This has resulted in sharply improved earnings and dividends. These basic trends will continue.

As the company liquidates its Norfolk and Western holdings during the eight and one-half year period allowed, it should be able to put the more than $300,000,000, it very likely will receive, to good work for the shareholders. The management has demonstrated great ability in its diversification efforts to date and there is every reason to believe they will be just as astute in the future.

(3) The direct merger savings have been estimated at $81,000,000 to be reached within five to eight years after the merger. These savings will range from $3.25 to $3.50 per share from 1972 to 1975. There is reason to believe that these gains which will benefit the public and the share-

Exhibit NHI-62

holders will not be met and perhaps even exceeded. The management ability to do this is there.

(4) There will be periods of business decline when the sharp upward improvement trend will be arrested but, with the merger savings being but little affected by the average business readjustment, an upward improvement trend should continue.

(5) By 1972-1975 the Penn-Central stock may be reasonably expected to earn in a range of $12.00 to $14.00 per share, pay a dividend of $5.00 to $6.00, be worthy of a 12 to 14 price earnings ratio and have market value in a range of some $144-$196.

• • •

Exhibit NHI-65

Prepared Testimony of William J. Kirk a Witness for the New Haven Trustees

—1—

I am William J. Kirk. I reside at 20 Morse Road, Newtonville, Massachusetts. Together with Richard Joyce Smith, I am one of the two present Trustees of the property of The New York, New Haven and Hartford Railroad Company.

On July 26, 1961, Mr. Smith and I, and Harry W. Dorigan, who died in the spring of 1966, were appointed Trustees by Judge Robert P. Anderson. Judge Anderson was then Chief Judge of the United States District Court for the District of Connecticut, and subsequently became a United States Circuit Judge for the Second Circuit. Judge Anderson continues to sit in the New Haven reorganization by special designation.

The appointments of Mr. Dorigan, Mr. Smith and myself were ratified by this Commission by Order dated July 31, 1961 and we qualified as Trustees and undertook our responsibilities in this reorganization on August 3, 1961. Since the death of Mr. Dorigan, Mr. Smith and I have been responsible for the management and operation of the New Haven. From the beginning of this reorganization, the Trustees have had as their principal questions: Can the New Haven be reorganized? If so, how should it be done? How is it to be kept in operation while it is being done?

As to my personal background, I was graduated from Massachusetts Institute of Technology with a degree of

Exhibit NHI-65

S.B. in 1928. In 1930 I received the degree of M.B.A., with High Distinction, from the Harvard Graduate School of Business Administration. In subsequent years, while

employed, I attended Boston College Law School and received an LL.B degree in 1942. I was admitted to the Bar of the Commonwealth of Massachusetts in that year.

With the exception of the years 1942-1945, when I was on active duty with the United States Navy, attaining the rank of Commander in the latter year, I have been continuously employed since 1932 by John P. Chase, Inc. This firm has its principal office in Boston and has an European office in Geneva, Switzerland. I am now, and have been for several years, President of the firm. It is engaged in the business of investment counsel and financial adviser to individuals, businesses, corporations, law firms, charities, schools and colleges. An important aspect of its business is that of investment adviser to a number of investment companies registered with the Securities and Exchange Commission under the Investment Company Act of 1940.

I have worked for more than 35 years in banking, business and finance and, particularly, as a security analyst and financial expert. I have had occasion during that period to be an expert witness on financial matters for New England Telephone Company. I have, in addition, been the adviser to various individuals and businesses on financial matters.

I have worked extensively with railroad securities and finance during my 35 years with John P. Chase and, before that, as a junior employee at Lee Higginson Trust

Exhibit NHI-65

Company. One cannot study railroad finance without also studying operations, competitive factors and economic

influences and potential. My background in this connection has had the benefit not only of general business training and work but, specifically, a New England business orientation. I am a native of New England and have lived there my entire life. I think I know the qualities and characteristics which enter into an analysis and appraisal of a New England business.

Mr. Smith has testified concerning the initial conclusions of the Trustees regarding the possibilities for reorganization of the New Haven. We concluded during the first six months of our trusteeship, and every fact which has come to my attention since that time has confirmed those initial conclusions for me, that a reorganization of the New Haven, based upon the assumption of its continuance as an independent railroad would not be feasible. This conclusion is the same whether it is assumed the New Haven would continue essentially to perform its present service, or to perform only its basic freight service, or to perform only its basic passenger service.

While I can conceive that one or more of these alternative independent operations could be subsidized and thus hold the theoretical possibility of a foundation for promulgation of fair and equitable treatment of those having claims against the Estate, there is no present indication of any firm overall possibility of this kind. The realization of any full subsidy program is so remote in my opinion as to be unworthy of serious consideration.

Exhibit NHI-65

—4—

In my judgment, there are two fundamental reorganization possibilities. In this regard, I intend to use the word "reorganization" in the broad form of describing a fundamental change in the New Haven's present operations, without regard to the corporation, as such, or its capital structure. The first of these possibilities is to sell the New Haven to some other person who will continue the operations essentially as at present. Such a sale could take the form of a conveyance of title to specific assets or, alternatively, some type of conveyance by operation of law, such as consolidation or merger or acquisition of control.

The second alternative for the New Haven is liquidation, under which the operations would not be continued essentially as at present. In discussing this alternative, I include within my definition, the recognition that segments of the railroad might well be sold to one or more other railroads as operating units to be integrated with their operations.

My specific function as a witness in this matter is to testify with respect to the conclusions which Mr. Smith and I have reached with regard to the relative merits of the alternatives which I have described, and the plan we have filed to carry out our conclusions.

Mr. Smith has testified to the negotiations which occurred over a period of some 30 months, beginning in the fall of 1963 and ending with the execution and delivery

—5—

of the agreement dated April 21, 1966. If I include the amendment to that agreement, occasioned by the Commission's report and order herein which was served April

27, 1966, the negotiations took place in a period which exceeded 36 months, ending on October 4, 1966.

During that period we have had communications of all types with persons directly claiming an interest in the Estate or having the status of representation of some claimed interest. Among such persons were the trustees under the indentures securing the New Haven's bond issues, counsel for those trustees, individual holders of New Haven bonds such as Oscar Gruss & Son, Inc., a committee for the New Haven's First Mortgage bonds, the Governors and their staffs of the four states served by the New Haven, and the United States of America.

Since the first few months of our trusteeship, in which our primary occupation necessarily had to be the control of the existing cash attrition, we have spent five years in the process of considering, formulating and presenting a reorganization plan. That period has been largely taken up by our study of the impact of a Penn-Central merger upon the New Haven, our participation in the merger proceedings as a party seeking inclusion, our negotiations and agreement with Penn-Central and the preparation and filing of our plan.

Before going the details of our reasoning and conclu-

sions, I will state the Trustees' general position. We believe that the course which we have pursued was reasonable and the best possible under the circumstances, that the terms of the sale which we have negotiated are fair, and that consummation of our plan will produce a fair, equitable and feasible reorganization. In stating that con-

Exhibit NHI-65

clusion, let me emphasize that our approach has always been that we should be guided by what we considered to be the best interests of the Estate.

We have also had in mind the public interest factors involved because the nature of the reorganization makes that essential. The public served by the railroad, as passengers, and as shippers and receivers of goods; the work force, which even now numbers in excess of 9,000 men and women; and the economic effect on southern New England of a termination of operations of this railroad, which is not only the largest in the New England area but essentially twice as large as any other; cannot be disregarded. If a plan can be devised which protects these interests without depriving others of paramount legal rights, such a plan should be formulated. We have not, however, had the difficult problem of attempting to weigh the protection of these interests against the protection of New Haven's creditors since our plan, we believe, stands independently as a proper application of concepts of creditors' rights as well as satisfying all concepts of public interest and social consequence.

• • • • •

—22—

I now turn to the valuation of the package of consideration which will be received upon consummation of the sale.

The first item to be considered is the value of the 950,000 shares of stock of the merged company which we would receive. I am assuming for this valuation that the anti-dilution clause contained in the agreement will not require any adjustment prior to closing. Mr. Roehl, who has

Exhibit NHI-65

Company. One cannot study railroad finance without also studying operations, competitive factors and economic

influences and potential. My background in this connection has had the benefit not only of general business training and work but, specifically, a New England business orientation. I am a native of New England and have lived there my entire life. I think I know the qualities and characteristics which enter into an analysis and appraisal of a New England business.

Mr. Smith has testified concerning the initial conclusions of the Trustees regarding the possibilities for reorganization of the New Haven. We concluded during the first six months of our trusteeship, and every fact which has come to my attention since that time has confirmed those initial conclusions for me, that a reorganization of the New Haven, based upon the assumption of its continuance as an independent railroad would not be feasible. This conclusion is the same whether it is assumed the New Haven would continue essentially to perform its present service, or to perform only its basic freight service, or to perform only its basic passenger service.

While I can conceive that one or more of these alternative independent operations could be subsidized and thus hold the theoretical possibility of a foundation for promulgation of fair and equitable treatment of those having claims against the Estate, there is no present indication of any firm overall possibility of this kind. The realization of any full subsidy program is so remote in my opinion as to be unworthy of serious consideration.

Exhibit NHI-65

—4—

In my judgment, there are two fundamental reorganization possibilities. In this regard, I intend to use the word "reorganization" in the broad form of describing a fundamental change in the New Haven's present operations, without regard to the corporation, as such, or its capital structure. The first of these possibilities is to sell the New Haven to some other person who will continue the operations essentially as at present. Such a sale could take the form of a conveyance of title to specific assets or, alternatively, some type of conveyance by operation of law, such as consolidation or merger or acquisition of control.

The second alternative for the New Haven is liquidation, under which the operations would not be continued essentially as at present. In discussing this alternative, I include within my definition, the recognition that segments of the railroad might well be sold to one or more other railroads as operating units to be integrated with their operations.

My specific function as a witness in this matter is to testify with respect to the conclusions which Mr. Smith and I have reached with regard to the relative merits of the alternatives which I have described, and the plan we have filed to carry out our conclusions.

Mr. Smith has testified to the negotiations which occurred over a period of some 30 months, beginning in the fall of 1963 and ending with the execution and delivery

—5—

of the agreement dated April 21, 1966. If I include the amendment to that agreement, occasioned by the Commission's report and order herein which was served April

27, 1966, the negotiations took place in a period which exceeded 36 months, ending on October 4, 1966.

During that period we have had communications of all types with persons directly claiming an interest in the Estate or having the status of representation of some claimed interest. Among such persons were the trustees under the indentures securing the New Haven's bond issues, counsel for those trustees, individual holders of New Haven bonds such as Oscar Gruss & Son, Inc., a committee for the New Haven's First Mortgage bonds, the Governors and their staffs of the four states served by the New Haven, and the United States of America.

Since the first few months of our trusteeship, in which our primary occupation necessarily had to be the control of the existing cash attrition, we have spent five years in the process of considering, formulating and presenting a reorganization plan. That period has been largely taken up by our study of the impact of a Penn-Central merger upon the New Haven, our participation in the merger proceedings as a party seeking inclusion, our negotiations and agreement with Penn-Central and the preparation and filing of our plan.

Before going the details of our reasoning and conclu-

sions, I will state the Trustees' general position. We believe that the course which we have pursued was reasonable and the best possible under the circumstances, that the terms of the sale which we have negotiated are fair, and that consummation of our plan will produce a fair, equitable and feasible reorganization. In stating that con-

Exhibit NHI-65

clusion, let me emphasize that our approach has always been that we should be guided by what we considered to be the best interests of the Estate.

We have also had in mind the public interest factors involved because the nature of the reorganization makes that essential. The public served by the railroad, as passengers, and as shippers and receivers of goods; the work force, which even now numbers in excess of 9,000 men and women; and the economic effect on southern New England of a termination of operations of this railroad, which is not only the largest in the New England area but essentially twice as large as any other; cannot be disregarded. If a plan can be devised which protects these interests without depriving others of paramount legal rights, such a plan should be formulated. We have not, however, had the difficult problem of attempting to weigh the protection of these interests against the protection of New Haven's creditors since our plan, we believe, stands independently as a proper application of concepts of creditors' rights as well as satisfying all concepts of public interest and social consequence.

• • • • •

—22—

I now turn to the valuation of the package of consideration which will be received upon consummation of the sale.

The first item to be considered is the value of the 950,000 shares of stock of the merged company which we would receive. I am assuming for this valuation that the anti-dilution clause contained in the agreement will not require any adjustment prior to closing. Mr. Roehl, who has

already testified in this proceeding, arrived at a valuation range of $144 to $196 per share for this stock, valuing it as of two dates. The most important of these valuations is, of course, the one which reflects the benefits of the

merger savings.

I think that the market value of the stock as of this time is not of great significance to the valuation of the consideration. At the same time, however, I believe that the question of a valuation for purposes of ultimate treatment of claimants in the Estate need not be faced in appraising the proposed sale. I think that the important valuation at this time is to estimate the range of the fair value of the stock expected to exist at the time the assets will be conveyed.

Since commencement of our negotiations, I have felt that the market value which could be properly be assumed to exist at the time of consummation of the sale should fall in a range from $75 to $100 per share. Thus, without comparing my valuation with Mr. Roehl's whose analysis was made in order to appraise for the Trustees the foreseeable values for reorganization purposes, I believe that a fair valuation of the stock for purposes of appraising the sale may fairly assume a market price of $87.50 which is the midpoint of my estimated range of market price at the time the sale is closed.

On this basis, the estimated market value at date of consummation would be $83,125,000. In using this valuation, I must stress that I do not intend that it should be considered as an expression of my opinion of the valuation

Exhibit NHI-65

for the stock for purposes of the step of the plan which will deal with the treatment of creditors. I do not consider any estimate of spot market such as I have made here

—24—

to be a determinant of value for those purposes.

. . . . . .

Exhibit NHI-87

Agreement Between The New York Central and Hudson River Railroad Company, The New York, New Haven and Hartford Railroad Company, and New York and Harlem Railroad Company Introduced by Penn Central's Witness Rouet

THIS AGREEMENT, made this 24th day of July, 1907, by and between THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, hereinafter called the Central Company, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, hereinafter called the New Haven Company, and THE NEW YORK AND HARLEM RAILROAD COMPANY, hereinafter called the Harlem Company:

WHEREAS, the trains of the New Haven Company enter the City of New York upon and over the tracks of the Harlem Company, under and pursuant to a certain contract, dated the 17th day of March, 1848, made by and between the Harlem Company and the New York and New Haven Railroad Company (the predecessor of the New Haven Company); and

WHEREAS, the Central Company is the lessee of the entire steam railroad property of the Harlem Company, including the Grand Central Depot, in the City of New York, under a lease dated the first day of April, 1873, for a term which will expire on the first day of April, 2274, subject to the provisions of said contract of March 17th, 1848; and

WHEREAS, the Central Company (for itself and the Harlem Company) and the New Haven Company now use the said Grand Central Depot, under the provisions of a certain agreement known as the "Tripartite Lease," dated the first day of November, 1872, as modified by four agreements supplemental thereto, dated, respectively, the 31st day of December, 1885, the 14th day of July, 1897, the 17th day of August, 1898, and the 23d

Exhibit NHI-87

day of March, 1899, all made by and between the parties hereto; and

WHEREAS, in and by the said lease dated the first day of April, 1873, the Harlem Company duly assigned and transferred to the Central Company the said contract dated March 17, 1848, and the said "Tripartite Lease" dated November 1, 1872; and

WHEREAS, in order to provide facilities for the proper management and conduct of the business of the Central Company (for itself and as such assignee and lessee of the Harlem Company) and of the New Haven Company, and in order to carry out the provisions of Chapter 425 of the Laws of 1903 of the State of New York (copy of said act and of the act amendatory thereof being hereto annexed) it is necessary to make certain additions and changes in and about the Grand Central Depot, the yards and tracks connected therewith, and in respect to certain streets and avenues in the vicinity thereof;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That the parties hereto, in consideration of the premises, and of the mutual covenants herein contained, have agreed, for themselves, their successors and assigns, with each other as follows:

1. The words "Railroad Terminal," wherever hereinafter used, shall mean and include the land, and interests in land, and all improvements thereon (not including the distributing system hereinafter mentioned), and all rights in any ways on which said land may abut, as illustrated and described in Schedules I, II, III, IV and V, hereto attached and hereby made a part of this agreement.

Exhibit NHI-87

Schedule I describes the land and interests in land and illustrates the boundaries thereof upon and within which said Railroad Terminal is located.

Schedule II describes and illustrates the Suburban Level, together with the approaches to and exits from such Suburban Level.

Schedule III describes and illustrates the Express Level, together with the approaches to and exits from such Express Level.

Schedule IV describes and illustrates the Street Level, together with the approaches to and exits from such Street Level.

Schedule V describes and illustrates cross-sections and longitudinal sections of the various levels covered by Schedules II, III and IV.

2. The Central Company covenants and agrees, at its own expense, to procure or furnish all land and interests in land and all rights in any ways on which the said land may abut not now owned by it or by the Harlem Company and required for the said Railroad Terminal, and to construct the said Railroad Terminal, as so described and illustrated, with all appurtenances connected therewith.

3. The Central Company, acting for itself and the Harlem Company, as hereinafter authorized, in consideration of the rents hereinafter reserved to be paid by the New Haven Company, and in consideration of the covenants on the part of the New Haven Company hereinafter contained, hath demised, let and leased, and by these presents doth demise, let and lease unto the New Haven Company, during the term of the New Haven

Exhibit NHI-87

Company's charter and all renewals thereof, including the charter of any company which shall operate the present railroad of the said New Haven Company, the use, in common with the Central Company, subject to all the provisions of this agreement, of the said Railroad Terminal for the accommodation of the traffic of the New Haven Company, other than freight traffic, provided, however, that the New Haven Company's right to the use thereof shall in no event exceed fifty (50) per centum of the maximum capacity of said Railroad Terminal, or of any part thereof.

4. The New Haven Company covenants and agrees with the Central Company to pay to the Central Company during the term of said lease dated April 1, 1873, and any renewals thereof, and thereafter to the Harlem Company, its successors or assigns, as compensation for the premises hereby demised, as described in Section 1, a proportion annually of $485,393.69, being interest on the cost of that part of the present terminal constructed under the agreements dated November 1, 1872, and December 31, 1885, and in addition thereto a proportion of interest reckoned at the rate of four and one-quarter (4¼) per centum per annum on actual net expenditures specified in sub-division (3) of Schedule VII hereof and made or to be made, as follows:

(*a*) In acquiring land for the Railroad Terminal other than the land included in the said agreements of November 1, 1872, and December 31, 1885;

(*b*) In constructing said Railroad Terminal;

(*c*) In repairing, rebuilding or changing any part of the Railroad Terminal made necessary by act of God, fire, civil commotion, violence, casualty or operation of law;

Exhibit NHI-87

(*d*) In complying with the provisions (other than the provisions for annual payments) of four agreements made by and between the Central Company, the Harlem Company and the City of New York, dated respectively June 19, 1903; December 4, 1903; April 28, 1905; and July 8, 1907; and of permit dated June 21, 1905, issued by the President Borough of Manhattan, in accordance with resolution of Board of Estimate and Apportionment adopted April 28, 1905, authorizing said agreement of same date; copies of which are hereto annexed;

(*e*) In making any other changes in or additions to the Railroad Terminal to which the New Haven Company shall have previously given its assent in writing;

The New Haven Company's proportion of said fixed charges shall in no event be less than $160,179.92 in each year.

These six items shall be payable quarterly.

The New Haven Company further covenants and agrees to pay to the Central Company, as compensation for said demised premises and in consideration hereof, a proportion

(*f*) Of the annual net payments required by the terms of said agreements with the City of New York;

(*g*) Of all premiums for insurance which may be placed and of all taxes and assessments which may be levied upon the Railroad Terminal during the term hereby granted. The taxes and assessments and premiums for insurance on property now or hereafter appearing in said schedules, which may be assessed or insured as a whole, but of which separate portions may be occupied by the Railroad Terminal, the Central

Company or the New Haven Company shall be divided between the parties occupying the same in proportion to the value of the use of the part so occupied;

These two items shall be payable annually;

(*h*) Of all net cost of maintenance, repairs and renewals of the Railroad Terminal;

(*i*) Of all net expenditures for the operation of the Railroad Terminal;

(*j*) Of all net expenditures required to contest, settle or pay claims, actions or judgments, for loss of or damage to property and for injury to or for the death of persons (except loss of or damage to the equipment of the parties hereto, any such loss or damage being provided for in Section 16 hereof) caused by the acts or omissions of the Terminal Manager, his agents or servants, while engaged in the maintenance or operation of the Railroad Terminal; agents and servants of the Terminal Manager, as used in this paragraph, means agents and servants employed by the Terminal Manager for the purpose of performing the duties imposed upon him by this agreement;

Such claims, actions or judgments may be settled by the party against whom such claim is made, action is brought or judgment is rendered when authorized in writing by the other party.

These three items shall be payable within thirty days after the Central Company shall render bills for the same.

The method of determining the proportion of the use of said Railroad Terminal, or of any part thereof, to which each company shall be entitled and the propor-

tions of the aforesaid payments so to be made by the New Haven Company shall be by ascertaining for the month, quarter or year in question the proportion which the use of the Railroad Terminal by the New Haven Company bears to the entire use thereof, use to be based upon the number of cars and locomotives, excepting those performing Railroad Terminal service, entering the said Railroad Terminal. For the purposes of this computation each car and each locomotive shall be counted each time it shall enter the Railroad Terminal, including the cars of each Company hauled from Mott Haven yard, or other exterior storage yard, but not including the locomotives performing such haulage service.

None of the preceding provisions hereof shall apply to or include expenditures for switching and preparing cars for service, or any other special service which may be rendered at the request of the New Haven Company.

5. The Central Company shall provide tracks in those portions of its Mott Haven Yard illustrated and described in Schedule VIII, hereto attached and hereby made a part of this agreement (the said portions being hereinafter referred to as Mott Haven Yard) for storing and cleaning such of the New Haven Company's cars as cannot be stored and cleaned in the Railroad Terminal to such extent as the Central Company can do so consistently with the requirements of its own business. This provision shall not be construed to require the Central Company to provide any facilities other than tracks for cleaning such cars, or to be at any expense in respect thereto.

The New Haven Company covenants and agrees to pay to the Central Company, as compensation for Mott

Exhibit NHI-87

Haven Yard, a proportion of interest reckoned at the rate of four and one-quarter (4¼) per centum per annum on $2,000,000, and also on all actual net expenditures made or to be made for the purposes specified in the following items (*a*) and (*b*):

(*a*) In repairing, rebuilding or changing any part of Mott Haven Yard made necessary by act of God, fire, civil commotion, violence, casualty or operation of law;

(*b*) In making any other changes in or additions to Mott Haven Yard to which the New Haven Company shall have previously given its assent in writing.

These interest items shall be payable quarterly.

The New Haven Company further covenants and agrees to pay to the Central Company, as compensation for Mott Haven Yard, a proportion of all actual net expenditures made or to be made for the purposes specified in the following items (*c*), (*d*), (*e*) and (*f*):

(*c*) In the payment of all premiums for insurance which may be placed and in the payment of all taxes and assessments which may be levied upon Mott Haven Yard during the use thereof as herein provided, payable annually;

(*d*) In the maintenance, repairs and renewals of Mott Haven Yard;

(*e*) In switching cars in and upon Mott Haven Yard;

(*f*) In the payment of all sums required to contest, settle or pay claims, actions or judgments, for loss of or damage to property and for injury to or for the death of persons (except loss of or damage to the equipment of the parties hereto, any such loss or damage being pro-

vided for in Section 16 hereof), caused by the acts or omissions of the Terminal Manager, his agents or servants, while engaged in the maintenance, operation or use of Mott Haven Yard.

These items shall be payable within thirty days after the Central Company shall render bills for the same.

The method of determining the proportion of the aforesaid payments to be made by the New Haven Company for the use of Mott Haven Yard shall be by ascertaining for the month, quarter or year in question, the proportion which the number of cars of the New Haven Company entering Mott Haven Yard bears to the entire number of cars (excluding all crossing movements on the wye track near Tower "YD," and excluding all freight movements on the track designated as "Lead to Yard B" and excluding all movements of cars from the interior repair yard of the Central Company shown on the map attached to Schedule VIII) entering Mott Haven Yard; it being understood that all cars in either Company's service entering Mott Haven Yard are for the purposes of this section to be regarded as such Company's cars. Provided, however, that the proportion of interest at the rate aforesaid on $2,000,000 and of the charges specified in the foregoing items (*a*), (*b*), (*c*) and (*d*) of this section to be paid by the New Haven Company shall not be less than one-third (⅓) thereof.

In case, in the judgment of the directors of the Central Company, the Central Company shall require the Mott Haven Yard for its own business, then the New Haven Company's right to the use thereof shall terminate upon twelve months' written notice given to it by the Central Company. If such right shall be so termi-

nated, the New Haven Company shall be entitled, on such terms as may be agreed upon, to haul its cars over the Harlem Company's Port Morris Branch between the main line near Melrose Station and the intersection with the tracks of the Harlem River and Portchester Railroad to reach any storage yard which the New Haven Company may establish.

The New Haven Company shall have the right to terminate its use, as herein provided, of Mott Haven Yard at any time upon giving twelve months' written notice to the Central Company of its intention to terminate such use. Upon termination by either party of the New Haven Company's use of the said Mott Haven Yard, as aforesaid, the payment of compensation therefor by the New Haven Company shall cease.

The New Haven Company also covenants and agrees to pay or assume such proportion of the expense of hauling cars to and from Mott Haven Yard, or other exterior storage yard, and of the expense of switching service in said Railroad Terminal, and of the expense of cleaning, lighting, heating, stocking, repairing, watering and icing cars and of any other service performed at the request of the New Haven Company, either in said Railroad Terminal or in Mott Haven Yard as the service in each such case performed for the New Haven Company bears to the entire service in each such case performed; such expense of each and every such service (except that the expense of hauling cars to and from the Mott Haven Yard shall be limited to the cost of haulage only, on the Harlem Company's tracks, between the Railroad Terminal and Mott Haven Yard) shall include such interest charges, taxes, assessments, and premiums for insurance, repairs, renewals, maintenance, operation and the cost of

contesting, settling or paying claims, actions or judgments for loss of or damage to property and for injury to or for the death of persons caused by the acts or omissions of the Terminal Manager, his agents or servants, while engaged in the performance of such haulage or service as may be paid, incurred or imposed in connection with each and any such service. The expenditures upon which such interest charges, taxes, assessments and premiums for insurance are to be paid are specified in sub-division (3) of Schedule VII hereof. All amounts payable to the Central Company under the provisions of this paragraph shall be payable within thirty days after the Central Company shall render bills for the same.

Agents and servants of the Terminal Manager, as used in this section, means agents and servants employed by the Terminal Manager for the purpose of performing the duties imposed upon him by this agreement.

All claims, actions or judgments mentioned in this section may be settled or paid by the party against whom such claim is made, action is brought or judgment is rendered when authorized in writing by the other party.

All the work and service performed for either party under the provisions of this section shall be done by or under the direction of the Terminal Manager, appointed as hereinafter provided.

6. The New Haven Company hereby covenants and agrees with the Central Company not to assign this lease or any interest therein, or any interest in or to the use of the said Railroad Terminal hereby demised, or to underlet the same or any part thereof without the previous written consent of the Central Company, and also not to use or occupy any part of the demised premises or

privileges or permit the same to be used or occupied for any purpose other than those for which the same are herein stated to be demised; provided always, and these presents are upon the express condition, that if the New Haven Company shall at any time during the term of this lease make default in the performance of any of the covenants and agreements herein contained to or with the Central Company, and continue therein for a period of sixty days after notice thereof or demand in respect thereto in writing, then and in every such case, and although no advantage may have been taken of previous defaults, these presents and the term hereby granted shall, as to the New Haven Company, cease and become void at the option of the Central Company; and it shall be lawful for it to enter into and upon said premises and repossess itself thereof. The New Haven Company further covenants to and with the Central Company, that on the expiration or sooner determination of the term hereby granted, it will quietly leave, surrender and yield up the premises and privileges hereby demised to it, with the appurtenances, unto the Central Company.

The Central Company hereby covenants and agrees with the Harlem Company that all the provisions in respect to default contained in the said lease made by the Harlem Company to the Central Company and dated April 1, 1873, shall enure to the benefit of the Harlem Company and shall apply to and be binding upon the Central Company in case of any default on the part of the Central Company in respect to any of its covenants and agreements with the Harlem Company herein contained.

7. The New Haven Company covenants and agrees with the Central Company to accept and does hereby ac-

cept the demise and lease herein contained, and hereby covenants and agrees to keep, abide by, perform and observe all the terms and provisions hereof, including the provisions of any schedules now or hereafter hereto annexed and made a part of this agreement as herein provided.

8. And the Central Company covenants and agrees with the New Haven Company that the New Haven Company, paying the rent and sums of money hereinbefore mentioned and performing the covenants and agreements aforesaid on its part to be performed, shall and may at all times during the term hereby granted, peaceably have, hold and enjoy the premises herein demised to it, without any manner of trouble or hindrance of or from the Central Company or any one claiming under it.

9. In case of partial damage to or total destruction of the said Railroad Terminal, or of any part thereof, the Central Company covenants and agrees to rebuild and restore the same with all possible despatch. It is understood and agreed that so long as the present Grand Central Station buildings are used, each Company shall be entitled to and shall care for and maintain the same office space, for its exclusive use, to which it is entitled under existing agreements.

10. It is agreed that if either the New Haven Company or the Central Company shall hereafter desire to construct other railroad tracks up to and connect the same with said Railroad Terminal, such connection shall only be made at the point or points and in accordance with plans which shall be agreed upon between the said Companies. The compensation provided for in this agreement to be paid by the New Haven Company for the use of the Railroad Terminal is based upon the fact of the

continued use by the New Haven Company of the Harlem Road from the present connection near Woodlawn as an access to the Railroad Terminal. It is agreed that if any such new connection eliminates or diminishes the then use of the tracks of the Harlem Company by the New Haven Company, a new basis of compensation for said Railroad Terminal so long as the same shall be used by the New Haven Company may be demanded by the Central Company, based upon the value of the Railroad Terminal at the time when such connection may be made, and in case of disagreement such compensation shall be fixed by arbitration, as hereinafter provided.

11. None of the parties hereto shall, without the written consent of the others, at any time permit any other company to bring any cars or trains upon the said tracks between Woodlawn Junction and 42nd Street, or into the said Railroad Terminal.

12. The Railroad Terminal and so much of said distributing system as is located therein, exclusive of substation No. 1, and exclusive of the ducts, splicing chambers, manholes and appurtenances used for other than Railroad Terminal purposes, between said substation and 57th Street, shall be under the sole charge and direction of a Terminal Manager, who shall be appointed in writing by the Presidents of the Central and New Haven Companies, and shall be removable at any time upon written notice by either of said Presidents. In case the Presidents shall be unable to agree upon a successor, then and in that case he shall be appointed by arbitrators selected as hereinafter provided, and such appointee shall be removable in the same manner as if he had been appointed by the said Presidents. No removal of any Terminal

Manager shall, without the consent of both Presidents, take effect within less than ten or more than fifteen days after the service of such notice. Except as provided in Section 5 hereof the Terminal Manager shall engage in no other service without the consent in writing of both of the said Presidents.

13. It shall be the duty of such Terminal Manager to do all things necessary for the proper maintenance, operation and management of the Railroad Terminal and of that portion of the distributing system described in section 12 hereof for the purposes to which they are devoted under the provisions hereof, subject to and in accordance with rules and regulations agreed upon from time to time by the said Presidents.

14. The Terminal Manager shall prepare, or cause to be prepared and certified, proper vouchers for all expenditures or disbursements made by him hereunder, which shall be audited and paid by the Central Company. He shall also prepare or cause to be prepared proper collection bills for all rentals or other compensation due from any person or corporation for the use of or accruing from any part of the said Railroad Terminal, which collection bills shall be audited and collected by the Central Company; and all such rentals or other compensation so received, and not belonging exclusively to either Company, shall be credited to the fixed charges or to the cost of maintenance and operation of the said Railroad Terminal, as the same may be applicable.

All bills for the items mentioned in section 19 hereof in connection with the portion of the distributing system under the jurisdiction of the Terminal Manager shall be rendered direct against the Central Company for the pur-

pose of determining the proportion thereof to be paid by the New Haven Company, as provided in said section 19.

Any question as to the application of such rentals, or other compensation so received, shall be decided by the chief accounting officers of the Central and New Haven Companies.

15. The Central Company shall promptly render statements to the New Haven Company of all rentals and compensation and other sums herein provided to be paid by the New Haven Company, and also of all rentals or other compensation received by the Central Company from any person or corporation for the use of any part of the said Railroad Terminal, in sufficient detail to show the method of ascertainment, and shall at all times afford to the New Haven Company reasonable access to its records thereof for the purpose of verification.

16. Each of the parties hereto shall assume all liability for loss of or damage to property and for injury to or for the death of persons caused by its negligence or the negligence of its employees occurring in or upon said Railroad Terminal or said Mott Haven Yard, except that neither of the parties hereto shall be liable to the other for any damage to its equipment while in or upon said Railroad Terminal or said Mott Haven Yard, or while in transit to or from said Yard; employees, as used in this section, does not include agents and servants of the Terminal Manager as defined in Sections 4 and 5 hereof; equipment as used in this section does not include equipment provided or used by the Terminal Manager for the purpose of performing the duties imposed upon him by this agreement, but any loss of or damage to equipment so provided or used shall be borne as a part of the net

expenditures for the maintenance and operation of the Railroad Terminal.

17. The Central Company covenants and agrees to furnish electric current for the movement of its own trains between Woodlawn and 42nd Street, and the necessary distributing system for current from the power station to contact shoes on the equipment of both of the parties, said distributing system to embrace the necessary transmission lines, sub-stations, storage batteries, working conductors and appurtenances thereto.

The New Haven Company covenants and agrees to furnish and deliver at the bus-bars of the Port Morris Power Station of the Central Company three-phase alternating current at twenty-five cycles per second, at all times sufficient for the requirements of its equipment between Woodlawn and 42nd Street, upon and under the condition that the regulation at the Port Morris end of the transmission lines shall be such that the power station of the New Haven Company at Cos Cob will run in parallel, satisfactorily and without electrical unbalance, with the power station of the Central Company at Port Morris. The New Haven Company shall derive the same benefits as the Central Company in the use of the said batteries of the Central Company; and upon and under the further conditions set forth in Schedule VII, hereto attached and hereby made a part of this agreement.

18. The New Haven Company shall have the use of said distributing system of the Central Company necessary for conducting the traffic of the New Haven Company, other than freight traffic, over the tracks of the Harlem Company from the junction at or near Wood-

lawn, to, into, upon and throughout the said Railroad Terminal;

The distributing system thus to be used jointly by both Companies is illustrated and described upon Schedule VI, hereto attached and hereby made a part of this agreement.

19. The New Haven Company further covenants and agrees with the Central Company to pay to the Central Company for the use of the distributing system between Port Morris power house and the contact shoes of its equipment using the same, as described in Sections 17 and 18, a proportion of interest reckoned at the rate of four and one-quarter (4¼) per centum per annum on the actual net expenditures made or to be made as follows:

(*a*) In constructing and completing the said distributing system shown upon Schedule VI;

(*b*) In repairing, rebuilding or changing any part of the said distributing system made necessary by act of God, fire, civil commotion, violence, casualty or operation of law;

(*c*) In making any other changes or additions to the said distributing system to which the New Haven Company shall have previously given its written consent.

These three items shall be payable quarterly.

The New Haven Company further covenants and agrees with the Central Company to pay the Central Company as compensation for the use of the said distributing system, a proportion:

(*d*) Of all premiums for insurance which may be placed, and of all taxes and assessments which may be

levied upon the said distributing system during the term hereby granted, payable annually;

(*e*) Of all net cost of maintenance, repairs and renewals of the distributing system;

(*f*) Of all net expenditures for the operation of the said distributing system.

These two items shall be payable monthly.

The method of determining the proportions of the aforesaid payments to be made by the New Haven Company to the Central Company shall be by ascertaining for the month, quarter or year in question, the proportion which the use by the New Haven Company bears to the entire use of such distributing system, as described in Schedule VII.

Provided, however, that the proportion of such charges specified in (*a*), (*b*), (*c*) and (*d*) of this section to be paid by the New Haven Company shall not be less than one-third (⅓) thereof.

(1) Each party shall assume all liability for loss of or damage to property, and for injury to or for the death of persons, proximately caused by its own negligence or by the negligence of its own employees (other than employees engaged in maintaining and operating said distributing system) and if any accident shall be so proximately caused the party liable therefor shall bear all consequent loss, damage and injury incident to the use of said distributing system.

(2) Each party shall assume all liability for loss of or damage to property, and for injury to or for the death of persons in or upon its trains or otherwise in its custody, proximately caused

by or by the use of said distributing system or by the negligence of any employee engaged in maintaining or operating said distributing system.

(3) All liability for loss of or damage to property and for injury to or for the death of persons, whether or not upon the trains or otherwise in the custody of either party, incurred while using said distributing system, and proximately caused by the negligence of both companies or of one or more employees of each of them (other than employees engaged in maintaining or operating said distributing system), and all liability for loss of or damage to property and for injury to or for the death of persons not in or upon the trains or otherwise in the custody of either of them and proximately caused by or by the use of said distributing system or by the negligence of any employee engaged in maintaining or operating said distributing system, shall be assumed by the parties hereto as a part of the expense of the operation of said distributing system.

Nothing in the three preceding paragraphs shall impose upon either party any liability for loss of or damage to the equipment of the other party while in or upon said Railroad Terminal or said Mott Haven Yard or while in transit to or from said Mott Haven Yard as provided in Section 16 hereof.

Should either the New Haven Company or the Central Company fail to furnish all of the current needed to meet its requirements as provided in Section 17, the other Company shall have the right to supply the deficiency, and the current so supplied shall be paid for at the rate named in Schedule VII.

20. Neither of the parties hereto shall assign this contract or any interest thereunder to any railroad company

which may be a rival or competing line to the other, without the written consent of such other party.

21. The schedules hereinbefore referred to are of even date herewith and are signed by the New Haven Company and by the Central Company. The said schedules may at any time hereafter be modified or abrogated by mutual consent, and new schedules, similarly signed, may be added hereto; and any such new schedules shall form a part hereof.

22. In case of disagreement between the parties hereto as to the meaning or construction of this agreement, or any part thereof, or as to the respective rights and obligations of the parties hereto thereunder, or in case the representatives of the Central Company and the New Haven Company are unable to agree as to any matter which is left to their determination, then such points of difference or matter as to which there may be such failure to agree shall be submitted to three arbitrators, one to be chosen by the President of the Central Company, one by the President of the New Haven Company, and the third to be selected by the two so chosen; and the said three arbitrators, or a majority of them, shall decide with all reasonable despatch the issues before them, and such decision shall be a condition precedent to the enforcement of any right of action under this agreement. The expense of such arbitration shall be borne equally by the parties hereto.

23. All the rights and obligations of the parties hereto granted, created, assumed or imposed in and by said Tripartite Lease, dated the first day of November, 1872, and the said four agreements supplemental thereto, dated respectively the 31st day of December, 1885, the 14th day

of July, 1897, the 17th day of August, 1898, and the 23rd day of March, 1899, shall be terminated on the day on which this agreement takes effect.

24. The Harlem Company being the owner of a part of the lands required for the said Railroad Terminal, and having heretofore in and by said lease dated the first day of April, 1873, demised and let all of the said lands owned by it to the Central Company, subject to the said Tripartite Lease and said agreement dated the 17th day of March, 1848, and having in and by said lease assigned and transferred to the Central Company the said Tripartite Lease and said agreement, in consideration of the covenants of the Central Company in the said lease dated the first day of April, 1873, contained: Now, the Harlem Company in consideration of the covenants on the part of the Central Company herein contained, hath demised, let and leased and by these presents doth demise, let and lease unto the Central Company, during the term of its charter and all renewals thereof, including the charter of any company which shall operate the present railroad of the said Central Company, all of the said lands required for the said Railroad Terminal now owned by the Harlem Company, and hereby gives and grants to the Central Company the right to make all of the covenants and agreements herein contained by and on the part of the Central Company to and with the New Haven Company, and hereby consents to all the terms and provisions hereof; in consideration whereof the Central Company hereby covenants and agrees with the Harlem Company that it will carry out, fulfill and perform each and every of the conditions herein imposed upon the Harlem Company or by it agreed to be fulfilled or performed; it being

understood that in case of the termination of said lease of the Harlem Company to the Central Company dated the first day of April, 1873, the Harlem Company shall thereupon assume all of the obligations and have all of the rights of the Central Company under this agreement.

25. All the covenants and agreements herein contained shall be and remain in force during the term of the demise contained in section 3 hereof, and except as herein specifically provided, the covenants herein contained shall be binding upon and shall enure to the benefit of the successors and assigns of the parties hereto, respectively.

26. Nothing herein contained shall impair any of the rights of either of the parties hereto, under the agreement between the New York and Harlem Railroad Company and the New York and New Haven Railroad Company, dated March 17, 1848, as modified by arbitration, under date of June 27, 1856, and by arbitration under date of January 19, 1861, copy of which is hereto annexed.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement to be executed in triplicate and its corporate seal to be hereto affixed the day and year first above written.

THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY,

By W. H. NEWMAN,

(SEAL) *President.*

Attest:

D. W. PARDEE,
Secretary.

Exhibit NHJ-87

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By C. S. MELLEN,
President.

Attest:

JOHN G. PARKER,
Secretary. (SEAL)

NEW YORK AND HARLEM RAILROAD COMPANY,

By W. K. VANDERBILT,
President.

Attest:

D. W. PARDEE,
Secretary. (SEAL)

Exhibit NHI-87

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

AND

NEW YORK AND HARLEM RAILROAD COMPANY

Agreement

Dated November 10, 1913

GRAND CENTRAL TERMINAL

Exhibit NHI-87

SUPPLEMENTAL AGREEMENT, made this tenth day of November, 1913, between THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, (hereinafter called the "Central Company"): THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, (hereinafter called the "New Haven Company"), and NEW YORK AND HARLEM RAILROAD COMPANY, (hereinafter called the "Harlem Company"):

WHEREAS, the parties hereto heretofore entered into an agreement bearing date the 24th day of July, 1907, with relation to the Grand Central Terminal, in the Borough of Manhattan, City of New York, New York, referred to in said agreement and herein as the "Railroad Terminal"; and

WHEREAS, the Central Company and the New Haven Company have heretofore expended large sums of money in the construction of buildings within the limits of the Railroad Terminal, all or portions of which said buildings are leased or intended to be leased to outside parties, and it is intended in the future to construct other buildings within the limits of the Railroad Terminal, all or portions of which said buildings are also to be leased to outside parties; and

WHEREAS, it is desired to express more fully the intent of the parties hereto as to the right of the New Haven Company and the Central Company with respect to the construction, maintenance and use of such buildings and with respect to the rentals accruing from the leasing of such buildings or portions thereof;

Exhibit NHI-87

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That the parties hereto, in consideration of the premises, and of the mutual promises herein contained, have agreed for themselves, their successors and assigns, with each other as follows:

That the following words shall be added at the end of Paragraph 3 of said agreement of July 24th, 1907, expressing a demise and lease to the New Haven Company with the same effect as if they had formed a part of said agreement at the time of the original execution thereof by the parties hereto, to wit:

"It is understood and agreed that the use of the Railroad Terminal demised by this paragraph to the New Haven Company shall include the right on the part of the New Haven Company to join with the Central Company, in accordance with agreements relating thereto, made, or from time to time to be made, by and between the Central Company and the New Haven Company, in the construction, holding, maintenance and leasing of buildings, or parts thereof (other than such buildings or parts thereof as form a part of the Railroad Terminal to be constructed by the Central Company as hereinafter provided) upon the land included within the Railroad Terminal. In every such building, together with the right of support thereof, toward the construction of which the New Haven Company shall furnish or contribute money, and until it is reimbursed therefor, the New Haven Company shall have and own an undivided interest which shall bear the same proportion to the entire building as the amount of money furnished or contributed by the New Haven Company, and for which it has not been reimbursed, bears from time to time to

the entire cost of the construction of such building. At the time when the New Haven Company shall be fully reimbursed for all moneys furnished or contributed by it for or toward the construction of any such building, with interest at such rate as shall have been agreed upon, such undivided interest of the New Haven Company shall cease. In all cases in which the New Haven Company and the Central Company shall join in the construction of any such building or buildings, the rentals to be credited to the fixed charges or to the cost of maintenance and operation of the Railroad Terminal under the provisions of Paragraph 14 of this agreement shall include all rentals accruing from the leases of the buildings or parts of buildings so constructed, except such rentals as by agreement between the New Haven Company and the Central Company shall be paid over to the New Haven Company and the Central Company or either of them as a proper return for the moneys advanced by such party to provide for the construction of any said buildings. It is expressly understood and agreed that, to facilitate the raising of money for the construction of such buildings, any rights of the New Haven Company or of the Central Company in such buildings or any of them or any parts thereof and in or to any rentals accruing from the lease of such buildings or any of them or any parts thereof, may be, by agreement between the Central Company and New Haven Company, at any time hereafter, conveyed, assigned or pledged to one or more corporations, associations or trustees."

IN WITNESS WHEREOF, each of the parties hereto has caused this supplemental agreement to be executed in

triplicate and its corporate seal to be hereunto affixed the day and year first above written.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

By A. H. SMITH,
Senior Vice-President.

Attest:

D. W. PARDEE,
(SEAL) *Secretary.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By J. H. HUSTIS,
President.

Attest:

A. E. CLARK,
(SEAL) *Secretary.*

Exhibit NH1-87

NEW YORK AND HARLEM RAILROAD COMPANY,

By W. K. VANDERBILT,
President.

Attest:

D. W. PARDEE,
(SEAL) *Secretary.*

Approved on behalf of the New York Central and Hudson River Railroad Company and the New York and Harlem Railroad Company, December 27th, 1913.

W. H. NEWMAN,
LEWIS CASS LEDYARD, } *Committee*

Exhibit NHI-91

Prepared Testimony of Francis J. Gasparini a Witness for the New York Central Railroad Company

• • • • •

—10—

It is my judgment that it would be reasonable to assume that certain selected parcels probably will be sold ratably over a three-year period (recognizing that even some of these selected parcels may still be on hand at the end of three years) and that a substantial portion of the remaining properties (which, together with the selected parcels, will aggregate 75% of the total value reflected in Schedule A) will be sold ratably over a ten-year period. Thus, at the end of the ten-year period, there will still be on hand approximately 25% (in terms of the total values set forth in Schedule A) of the properties.

Exhibit NHI-92

Prepared Testimony of Norman J. Hull, Jr.
a Witness for the New York Central Railroad Company

* * * * *

—11—

Determining Present Worth of Future Liquidation Proceeds

Mr. William A. Gordon's prepared statement (NHI-41) reports a net liquidation value for the New Haven "before restatement to reflect the discounted present worth of the proceeds to be derived over a period of years as of December 31, 1965." (See page 7.)

Quite obviously, a realistic calculation of the value of the New Haven requires discounting of the liquidation

—12—

proceeds, since they will not be received immediately, but rather over an extended period of time. The Trustees of the New Haven will not have the benefit of the liquidation value of the New Haven's assets until the proceeds are actually realized.

The theory of discounting is too fundamental to require extended articulation by me. In very simple terms, tomorrow's dollar cannot be equated with today's, and

> "... As long as a positive rate of interest can be earned by any lender, a dollar to be received tomorrow will necessarily have less value than one received today. To compare properly the number of dollars paid out today in purchasing the capital good with the number of dollars of income that the capital good will earn over its life, we must compute the *present value* of those future dollars. This requires that we *discount*

Exhibit NHI-93

each of those future dollars for the number of years it is removed from the present; the present value depends upon the rate at which the future dollars are to be discounted."*

The rate at which future dollars should be discounted is not an easy question. While testifying, Mr. William A. Gordon gave an example using a 6% discount rate for the liquidation proceeds of the New Haven. (See pages 23418-20 of the transcript.) Mr. Frank A. Mason, Vice President, Meredith & Grew, Incorporated, who testified as to the liquidation of the New Haven's real estate holdings, testi-

fied that in his opinion a 6% rate for discounting the anticipated future proceeds would be "on the low side." (Page 23798 of the transcript.)

As of December 31, 1966 the so-called "prime" rate of interest for corporate borrowing at banks was 6%. Considering the risks and uncertainties involved in the liquidation of the New Haven, 6% rate is clearly too low.

There are substantial uncertainties in the liquidation of any industrial enterprise. These are present in a far greater degree in the liquidation of a railroad, partly because of the nature of the property and partly because of the wide geographical dispersion of the property. Among the many factors involved are:

(1) Fluctuations in the market prices for usable items such as rolling stock and relay rails;

---

* Shapiro, *Macroeconomic Analysis* (Harcourt, Brace & World, Inc. 1966), page 242. Edward Shapiro is a Professor of Economics at the University of Detroit, Detroit, Michigan.

Exhibit NHI-92

(2) Fluctuations in the market prices for steel, copper and other forms of scrap;

(3) Human error in estimating quantities of property available for sale—for example, the quantity of relay track which the New Haven will produce;

(4) Fluctuations in the market price of land; miscalculations as to the possible price impact of placing large amounts of land on the market; and various other

factors—some of which will be covered by Mr. John R. White in his testimony;

(5) Taking of land by eminent domain, with possible inadequate awards;

(6) Destruction of property by the elements, or fire or other hazards for which insurance proceeds are inadequate.

(7) Theft and pilferage of property for which insurance coverage is inadequate;

(8) Non-collectibility of receivables;

(9) Liquidation expenses in excess of estimates;

(10) Increased property taxes, sales taxes and other impositions which increase selling costs; and

(11) Litigation with other claimants, as for example, creditors of the leased lines.

In view of all these risks, it seems doubtful that any investor could be attracted to acquire the assets of the New Haven in liquidation except at a very substantial discount over and above a fair discount for interest alone.

Exhibit NHI-92

As an analogy (although there admittedly are distinctions, and hence we have not relied on the analogy), we call attention to the yields on railroad bonds. A railroad bond should reflect the backing of property of the same

—15—

general character as we are dealing with in the hypothetical liquidation of the New Haven. Some representative yields as at December 30, 1966 (we have selected principally issues of bonds due within the next 10 years or so of railroads of low credit standing) are set forth in Schedule B to this prepared statement. The simple average of the yield on the bonds listed is 11.35%; the median yield is 10.80%.

In choosing the rate, we have relied on the counsel of Mr. John R. White, since by far the largest portion of the assets to be sold over the 10-year period is real estate. Also, we have favored the approach of applying what we consider to be a low discount rate, in order to minimize argument as to what rate should be applied. With these considerations in mind, we have chosen 7%, and have applied that rate to an estimated schedule for receipt of the net liquidation proceeds over the 10-year liquidation period. That estimated schedule appears at page 39 of my Exhibit. As will be seen, we have assumed that a certain dollar value of assets would be sold, *on the average,* in the middle of the first year; that another stated dollar value of assets would be sold, on the average, in the middle of the second year, and so on. The expenses to be paid in each year have been deducted from the proceeds realized in that year. By applying the 7% rate to the estimated schedule for receipt of the *net* liquidation proceeds,

—16—

we have arrived at "present" (*i.e.,* as at December 31, 1966) net worth for such proceeds of $80,651,000.

Exhibit NHI-92

It is the opinion of the Pennsylvania and the Central that this figure is the maximum fair liquidation value of the New Haven that could reasonably be found as at December 31, 1966; and, further, that as time elapses, such liquidation value will constantly diminish by reason of continuing deterioration of the physical properties and financial condition of the New Haven.

Amended
(39)

Exhibit NHI-93

Estimated Liquidation Value of Assets of New Haven Railroad as of December 31, 1966 Introduced by Penn Central's Witness, Norman J. Hull, Jr.

• • • • •

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

NET PROCEEDS FROM LIQUIDATION BY YEAR OF REALIZATION

Year	(1) Proceeds of Real Estate	(2) Proceeds of Road Property excluding Real Estate in Col (1) (B)	(3) All Other Proceeds	(4) Total Proceeds	(5) Deduct: Liquidation Expenses	(6) Net Proceeds
1	$ 9,128,734	$ 6,981,332	$ 56,769,199	$ 72,879,265	$ 9,160,149	$ 63,719,116
2	9,128,734	6,981,333		16,110,067	7,833,841	8,276,226
3	9,128,734	6,981,333		16,110,067	7,727,027	8,383,040
4	3,867,067			3,867,067	2,889,934	977,133
5	3,867,067			3,867,067	3,041,059	826,008
6	3,867,067			3,867,067	3,272,425	594,642
7	3,867,067			3,867,067	2,297,368	1,569,699
8	3,867,068			3,867,068	2,457,117	1,409,951
9	3,867,068			3,867,068	2,619,766	1,247,302
10	3,867,068			3,867,068	2,868,805	998,263
10 (A)	18,151,892			18,151,892	18,004,059	147,833
TOTAL	$ 72,607,566	$ 20,943,998	$ 56,769,199	$150,320,763	$ 62,171,550	$ 88,149,213

(A) Assuming sale of remaining property at end of tenth year.

(B) Includes Miscellaneous Physical Property.

Exhibit NHI-93 186c

Amended
(40)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

LIQUIDATION EXPENSES

10 YEAR PERIOD

Year	*Liquidation Expenses (Per Gordon study) (A)*	*Taxes on Salvageable Property (B)*	*Real Estate Costs*	*Real Estate Taxes (C)*	*Total Liquidation Expenses*
1	$ 5,009,491	$ 1,029,400	$ 987,273	$ 2,133,985	$ 9,160,149
2	3,678,020	698,900	1,322,936	2,133,985	7,833,841
3	3,564,357	362,600	1,666,085	2,133,985	7,727,027
4	1,131,944		854,003	903,987	2,889,934
5	1,131,944		1,005,128	903,987	3,041,059
6	1,131,944		1,236,494	903,987	3,272,425
7			1,393,381	903,987	2,297,368
8			1,553,130	903,987	2,457,117
9			1,715,779	903,987	2,619,766
10			1,964,818	903,987	2,868,805
10 (D)			13,760,768	4,243,291	18,004,059
TOTAL	$ 15,647,700	$ 2,090,900	$ 27,459,795	$ 16,973,155	$ 62,171,550

(A) Based on liquidation expenses on New Haven property, excluding leased lines, as indicated on page 46 of the Gordon study.

(B) Provided by Delos P. Bassinger.

(C) Represents unpaid real estate taxes as of December 31, 1966, and excludes $2,702,000 of accrued interest thereon, as furnished by Mr. Francis J. Gasparini.

(D) Expenses relative to property sold at the end of the tenth year.

Exhibit NHI-93

Amended
(41)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

NET PROCEEDS DISCOUNTED

10 YEAR PERIOD

Year	*Net Proceeds*	*Present Worth Factor*	*Present Worth*
1	$63,719,116	.9661835749	$61,564,363
2	8,276,226	.9019427057	7,464,682
3	8,383,040	.8419731669	7,058,295
4	977,133	.7859909607	768,018
5	826,008	.7337309722	606,068
6	594,642	.6849457137	407,297
7	1,569,699	.6394041529	1,003,672
8	1,409,951	.5968906186	841,587
9	1,247,302	.5572037794	695,001
10	998,263	.5201556904	519,252
10 (A)	147,833	.5025658844	74,296
	$88,149,213		$81,002,531

(A) Assuming sale of remaining property at end of tenth year.

Exhibit NHI-94

Prepared Testimony of John R. White a Witness for the Penn Central Railroad Company

• • • • •

—7—

I have been also requested to estimate the time period required for liquidation of the real estate. It is my judgment that a ten-year period for liquidation is probable and reasonable in view of the type of property, the large amount of land involved, and the effect on the market of the cessation of rail service. In making this estimate, I have studied the number of sales and the dollar volume resulting from sales of selected properties by both the New York Central and the New Haven Railroads over the past decade or so, with special attention to the number and aggregate dollar amount of sales since the New Haven was placed under trusteeship in mid-1961. I have also considered the amount of land, its location, size, shape, zoning and market conditions.

• • • • •

—13—

Effect of Rail Cessation on Real Estate Values

Cessation of freight and passenger service would have a significant depressing effect in two major types of real estate but the effect throughout New England's economy would in time undoubtedly be pervasive. Residential dwelling values within commuting range of Grand Central Station in New York and particularly through Greenwich, Connecticut, would be adversely affected at least temporarily and in all probability would suffer thereafter by comparison with areas with rail service. It is apparent that many families were influenced in their choice of a home

by the existence of the commuter rail service. Its termination would force use of less convenient methods of travel, such as elevated transit stations in outlying city sections, or by car into an already congested city. Another alternative would be to drive to rail stations of the New York Central System in the middle of Westchester County. Express commuter bus service would probably be instituted as a replacement for the rail service and this would mitigate the adverse effects to some extent. It is my belief, however, that bus service is an inadequate substitute for rail. Lack of terminal facilities, traffic congestion and weather delays are the principal deficiencies. Some homeowners would endure these conditions but others would move. Moreover, the demand for dwellings would undoubtedly abate. This would have a settling effect on residential real estate values. Surely the land appreciation of which the Westchester and Fairfield County resident has been a long

term beneficiary would in all probability terminate or in the long run at least be materially slowed.

The largest effect would be felt in the industrial market sections along the entire route system. Bulk users of rail freight services would be seriously hurt by elimination of rail sidings. The immediate effect would be a decline in demand for areas previously served by rail by those manufacturers and wholesalers who rely on it. In time, however, some existing manufacturers and bulk wholesalers would move to locations where the service is available. In this instance, there could be a significant decline in manufacturing employment along the route system.

There are of course many manufacturers who consider rail only as a "back up" or an alternative means of delivery and shipment. Others will be able to use coordinated

rail-highway service, such as piggyback service. There are also others who could readily adjust to the cessation of service. Quite obviously, however, rail is a compelling necessity for the heavy manufacturer, particularly in steel, fabricated metals, heavy machinery and large scale products of all types.

When one considers the sharp increase in the supply of outlying industrially zoned land and the inducements offered to industry to relocate, the loss of rail would become a serious matter to the metropolitan areas and especially to the central city where rail shipments are transferred and subdivided for further delivery by motor carrier.

Exhibit NHI-95

Appraisal of James D. Landauer Associates Submitted by the New Haven Trustees

—1—

PURPOSE OF THE APPRAISAL

The purpose of this appraisal is to estimate the fair and reasonable value of the subject real estate, assuming its sale as described below and assuming the termination of all railroad service and the removal of the tracks and other railroad installations. It is assumed further that, in such event, the special real estate tax advantages accorded railroad properties would cease and that these properties would become subject to taxation as ordinary real estate.

Under the conditions assumed, the seller, dealing here with unproductive property, would best serve its economic interests by making a persistent marketing effort to effect sales as quickly as possible, in order to minimize substantial holding costs which would reduce the net recovery from the sale of the real estate. Thus the seller would achieve a better net recovery by selling within a relatively short period of time—we believe three years—than by holding for a longer period. This appraisal represents our opinion of value for selling within such period.

Thus, our conclusion represents market value in a hypothetical liquidation, and is referred to herein for convenience as "liquidation value."

We are aware of the existence of leases of varying terms on many of the buildings within the yards. We have considered the effect which these leases would have on the value in terms of delays in possession for owner occupants. We have further considered the effect which these leases might have on the value as described and on the assumed disposition period.

Exhibit NHI-95

LOCATION

Half a century ago the southerly end of Bronx County was, both socially and economically, a well balanced and moderately prosperous community. Retail trade, finance and professional offices were centered at Third Avenue and 149 Street, popularly called the "Hub", while commerce and industry were located along the waterfront or close to the railroad freight yards. One family and small multifamily dwellings occupied much of the remaining area. Local residents found employment in the nearby bakeries, dairies, coal yards, lumber and brick yards and warehouses. Meat packers, brewers, coopers, bottle makers, piano manufacturers and feed grain dealers occupied prominent locations.

This is the section of the City shown on the "area map" included herewith and in which the subject properties are located.

In recent years, excepting those neighborhoods north of 149th Street and bordering on Grand Concourse, the residential portions of this part of Bronx County have been among the focal points of the City's slum clearance programs. Most of today's residents are in the lower income brackets and there has been practically no new housing built here in many years without some form of government subsidy. Improvements such as the Triboro Bridge, the Major Deegan Expressway and the Bruckner Expressway have provided the area with excellent highways, but it still has little attraction for prospective residents who do not qualify for subsidized housing.

The industrial sections of the south Bronx have fared better than the residential neighborhoods, although affected by those factors which have operated to the disadvantage

of industrial real estate in most large cities. Among those factors are:

1. Technological advances in industrial production which have forced construction of most new facilities on a one floor basis, thus requiring large land areas.
2. Outlying land is available on an acreage basis at low prices compared to in-town land on a square foot price basis.

3. The Federal Highway Program has opened vast land areas for industrial development that previously were considered too remote and inaccessible.
4. Tax abatement and other advantages offered by various states, counties and municipalities to attract industry.

There is still a fair demand by light manufacturing and service firms for moderate sized building sites in the vicinity of the subject properties. Such firms may be attracted by the ample number of semiskilled workers who live nearby or by the convenience of being located close to their customers. It is considerations such as these which have accounted for much of the industrial development during the past 20 years in the area lying between Bruckner Boulevard and the East River as far east as the Bronx River.

It seems unlikely that termination of the New Haven's railroad service would have a really depressing effect on the location under consideration. The New York Central Railroad's Port Morris freight yard is less than 300 feet away from the New Haven's Oak Point yard and is less than 3,000 feet from the Harlem River yard. Industries

needing railroad service would, doubtless, continue to get that service.

• • • • •

—14—

SUMMARY OF APPRAISAL

After careful examination of the subject real estate and after giving due consideration to all relevant factors including the size, location, condition, utility and marketability thereof, assuming the termination of all railroad service and the removal of the tracks and other railroad installations, and after studying sales and leases of comparable real estate, it is our opinion that THE FAIR AND REASONABLE LIQUIDATION VALUE of the Subject Real Estate as of December 31, 1966 is the sum of

FIFTEEN MILLION SEVEN HUNDRED EIGHTY FIVE THOUSAND DOLLARS ($15,785,000)

Divided as follows:

Section I	$8,985,000
Section II	200,000
Section III	6,600,000
Total	$15,785,000

Respectfully submitted,

/s/ JOHN R. WHITE
John R. White, M.A.I., C.R.E.

Exhibit NHI-97

Prepared Testimony of Carl Veazie a Witness for Penn and Central

* * * * *

TESTIMONY OF CARL VEAZIE

A&:ffi58:

QUESTION:

What is your name, title and connection with the Connecticut Development Commission?

ANSWER:

My name is Carl E. Veazie. I am an economist for the Development Commission and am Chief Economist of the Connecticut Interregional Planning Program, hereafter referred to as CIPP.

QUESTION:

What are your qualifications as an economist?

ANSWER:

I have a Bachelor's Degree in economics from Whitman College and a Master's Degree in business administration from Columbia University, where I specialized in transportation, foreign trade, and economic geography. I have been employed previously as an economist by Ebasco Services, Inc.; the Metropolitan Rapid Transit Commission (New York); Tippetts, Abbett, McCarthy & Stratton (engineers); and the Port of New York Authority.

Exhibit NHI-97

QUESTION:

What are your duties as Chief Economist of the Connecticut Interregional Planning Program?

ANSWER:

I am responsible for the conduct of the CIPP socio-economic and non-highway transportation studies. During the inventory phase of our program, I supervised the preparation of six reports on the demo-

graphic and economic structure of the state and two reports on the state's public services, including transportation. During a second phase of our program, I directed studies of Connecticut's economic assets and liabilities, major industries, and non-highway transportation, the latter including an analysis of railroad passenger service.

QUESTION:

Were you responsible for the preparation of a document entitled "CIPP Technical Report 153, Transportation"?

ANSWER:

Yes. This report was issued in April 1964 as a part of the inventory phase of CIPP. A summary of the conclusions of this study concerning rail transportation is annexed hereto as Exhibit A.

QUESTION:

Did that report contain basic data as to the importance of rail transportation, and particularly the New Haven's service, to the economy of Connecticut?

Exhibit NHI-97

ANSWER:

Yes. Pages 11 to 49 of the Report presented such data, and copies of such pages are annexed as Exhibit B to my testimony.

QUESTION:

What, in your view, would be the impact on Connecticut's economy of a total cessation of the New Haven Railroad's operations?

—3—

ANSWER:

The impact would be extremely severe. The economic activity of the State would be slowed markedly by loss of industrial activity dependent on the Railroad, by loss of employment and by loss of high-income commuting population.

QUESTION:

Would, in your opinion, this adverse economic impact carry over to real property values?

ANSWER:

Undoubtedly. The depressing effect on real estate values would certainly be substantial, particularly in areas along the route of the New Haven.

QUESTION:

Would this adverse impact on values carry over to real property to be sold by the New Haven itself in liquidation?

ANSWER:

I do not see how the Railroad's own property could escape the adverse effect of diminished property values adjacent to and near the line.

Exhibit NHI-99

Prepared Testimony of John W. Lane, a Witness for Penn and Central

* * * * * *

—1—

TESTIMONY BY JOHN W. LANE

My name is John W. Lane. I reside at 180 Boston Post Road, Larchmont, N. Y. 10538. I am a real estate broker and appraiser with offices at 180 Boston Post Road, Larchmont, New York.

I have been engaged in the real estate business since 1922. My activities have been principally on the Sound side of southern Westchester, with offices in New Rochelle and Larchmont, New York. Since 1963, I have devoted my entire time to real estate appraising and consulting work. A statement of my qualifications is attached to this statement.

My testimony consists of a statement of my opinion as to the effect of the closing of the New Haven Railroad on real estate and the economy of the Sound Shore, the cities, towns and villages presently served by the New Haven line.

The Westchester County Tax Commission, in its annual report to the Board of Supervisors, stated that the full value of real estate for the Sound Shore communities served by the New Haven Railroad, as of December, 1966, was nearly $1.9 billion. The communities included in this valuation are: The Town of Pelham (including the Villages

—2—

of Pelham, North Pelham and Pelham Manor), the City of Mount Vernon, the City of New Rochelle, the Town of Mamaroneck (including the Village of Larchmont and part of the Village of Mamaroneck), the Town of Harrison (in-

cluding the Purchase area), the Town of Rye (including part of the Village of Mamaroneck and the Village of Port Chester) and the City of Rye. This area is served by the New Haven Railroad.

If the railroad were to close down operations, I believe that real estate along the Sound Shore would decrease in value immediately.

I believe that residences would suffer by a minimum of 10% in market value, i.e., a $50,000 dwelling property would suffer by at least $5,000. Apartment house owners in the area would, in my judgment, also suffer a loss in market value for their property of at least 10%, and even higher where apartment buildings are within walking distance of the station. The advantage of their proximity to the station would, of course, disappear completely, under our hypothesis of complete cessation of service.

The impact of the closing down would adversely affect commercial and industrial properties as well, because certainly the Sound Shore communities would lose population. Loss in population would adversely affect retail sales vol-

ume in department stores, food stores, gas stations, etc. In my opinion, the resulting loss in market value for such properties would be a minimum of 10%. Urban renewal projects counting on future growth, such as the Macy complex in New Rochelle, would obviously be severely affected.

The resulting loss in market value of real estate generally would also adversely affect the value of the New Haven Railroad's own real estate holdings. In addition to the general decline, the factor of forced liquidation of these properties would reduce the value of these particular properties even further.

Exhibit NHI-99

During the Depression, in 1940, the New York, Westchester and Boston Railroad was ordered closed by Federal Judge Knox and the resulting damage to the communities served by this line was nearly catastrophic. At that time we had a poor real estate market generally, with low demand. Residential areas served by that railroad suffered as much as a 20% decline in property values. This condition lingered as long as five years. I view the New York, Westchester and Boston termination as having many parallels to the cessation of the New Haven Railroad with similar consequences for the Westchester area.

Map of a Portion of the Oak Point Yard
Submitted by the New Haven Trustees
Exhibit NHI-107

(See Opposite) ☞

NHI-107

Warehouse

Pipeline

Pipeline

Pipeline

Exhibit NHI-134

Rebuttal Testimony of John R. White a Witness for Penn Central

* * * * *

—12—

The pertinent facts of a most significant comparable sale have been omitted by Mr. O'Keefe, namely, the sale which is now pending to Arthur Rodolitz by the New Haven of a portion of the Oak Point Yard, consisting of approximately 600,000 square feet of upland and approximately 145,000 square feet of underwater land. The sale price is $1,200,000 or $2.00 per square foot for the upland area. This price has been approved by the Federal Court. The land in question represents a portion of the best land in the Oak Point Yard. It constitutes about half of the waterfront and the accessible frontage on East 149th Street. The balance of the Oak Point Freight Yard is accessible only through the small remaining accessible section of East 149th Street frontage and a 100-foot entranceway on Barry Street. Nevertheless, Mr. O'Keefe proceeds to value the balance of the Oak Point Yard, together with the Harlem River Yard "at $150,000

—13—

per acre which computes at $3.40 per square foot" even though the Federal Court approved the sale of the best portion of the Yard at $87,000 per acre or $2.00 per square foot for the upland area.

The Rodolitz sale is an example of my previous statement that the larger the parcel of land beyond the most marketable size, the smaller the wholesale unit price per acre.

I feel that both yards would have good marketability for plots of 50,000 to 150,000 square feet, provided that possession can be obtained of the obsolete buildings. Any purchaser will incur substantial costs for installing streets and

Exhibit NHI-134

utilities, demolishing existing structures, financing, engineering, legal and other charges incidental to holding real estate until the subdivided land is sold on a retail basis.

In arriving at my own valuation of the two freight yards, I have adjusted the land sales for market conditions, size, shape, terrain, apparent subsurface conditions, zoning, street frontage in relation to area, existence of public utilities, possession of improvements, and cost of demolition.

I have fully considered the small amount of useable street frontage available at both freight yards. Generally, up to 15% of the gross land area is required for streets. The exact amount depends on the size and shape of the subdivided plots. Stated in a different manner, some 100 to 300 lineal feet of street area is required per gross acre, again depend-

—14—

ing on the subdivision layout. The 1300 feet of road frontage at the Harlem River Yard represents only 1% of the land area. Thus, it is reasonable to expect that additional land will be lost through the need for subdivision. At Oak Point, there is virtually no street frontage remaining at grade after the Rodolitz sale. In the case of the Harlem River Yard, the existence of highly specialized buildings under varying lease terms makes the problem of possession a difficult one. The location of the buildings also complicates the subdivision of the land. Another adjustment in the process leading to estimate of value is the effect of the three elevated bridge spans of the utilization of the land.

In his appraisal Mr. O'Keefe gives no detailed description of either freight yard and thus does not deal with questions which reasonably arise as to the effects on marketability of the limitations I have noted in the previous paragraph.

Excerpts From Transcript of Hearings Before the Commission's Examiner, Commencing January 16, 1967

(The "Inclusion Hearings")

Cross-Examination of William Gordon, Witness for the New Haven Trustees

* * * * *

[23418] *Cross-Examination by Mr. Plimpton:*

In your liquidation study, Exhibit NHI-42, is it not correct, Mr. Gordon, that you have not been—not taken into account any discount by reason of the fact that these liquidation proceeds will not be received on December 31, 1965, but will be spread out over a period perhaps of ten years? A. We have not taken into account any discount to present worth, and I believe I testified in my— in NHI-41 that we had not made any such adjustment.

Q. In point of fact, have you made any study of what a proper discount might be by reason of the lengthy period of time it would take to realize these proceeds? A. Well, I don't know whether you would call it a study or not. I have made an estimate of what the discount would be under the assumptions made by Mr. Thompson and the real estate experts in connection with the real estate sales and also of our own study on the disposition of rail and [23419] other roadway materials.

Q. Could you tell us what the result of that calculation has been and tell us on what basis you made it, other than what you have indicated? A. Taking first the property other than real estate with a gross value of over 56 million dollars and using a discount factor of six percent for one and a half years—

Q. That's six percent per annum? A. Per annum, yes. The present worth would be $51,700 odd thousand. The amount of the discount is $4,700,000.

Now, going to the real estate and using the estimated sales by years over the six-year period—this is all on the six-year basis—we applied the discount factors using this six percent per annum factor again to the values for each of the years as the property was estimated to be sold. And in each case we used the mid-year figure. For example, property that was estimated to be sold in the first year, we assumed on the average would be carried six months. The property that was sold in the second year, we assumed the halfway point of that year so we applied a discount rate of one and a half years and so on, up through the fifth and sixth years. The fifth and sixth year figures on the estimated sales were lumped in the real estate witness' figures so there we used an average of five years as the discount. From the—Mr. Thompson's gross figure of [23420] $113,706 odd of gross valuation of land and buildings, the discounted value as of December 31, 1965 is $100,848 odd, making a discount of 12,859,000 which, when added to the discount for the other material makes a total discount of $17,563,000.

* * * * *

Cross-Examination of Bradford W. Thompson, Witness for the New Haven Trustees

[23441] *Cross-Examination by Mr. Pollack:*

Q. With regard to assumption number 3 on page 6 of NHI-44, in doing your evaluation, what did you consider a "normal size parcel"? A. A normal size parcel is considered through our experience, as being one of let us say normal size, not one of continual miles of railroad or large excessive areas.

Q. That confuses me a bit, Mr. Thompson. As I received [23442] that answer, normal size parcel came out to be normal size.

What precisely did you have in mind when you said we assume normal size? A. Well, it's quite definite that we pass through many types of areas or types of properties. In other words, residential property would presumable be a smaller sized parcel. And we are considering these from the available market that is in a normal sale of property.

Q. In other words, this assumption, which is number 3 on page 6, again had no standard numerical value but just was an assumption which played a part in your general analysis and review of what is the fair market value for a piece of property at a particular location, is that correct? A. I think if you continue to read that same sentence, it further clarifies the answer. In other words, unusual sales such as sales for highway purposes where continuity of ownership is required were not assumed, or pie in the sky, should we care to use that slang expression.

• • • • •

Cross-Examination by Mr. Pollack:

[23458] Q. With regard to page seven of NHI-44, which is your direct testimony, and with reference to the answers you have just been giving, you state near the top of the page that your NHI-45 contains "Statements of fair market values." A. Would you give me the page number, please.

Q. Page seven, sir. A. Page seven.

Q. Six lines down.

Your Exhibit NHI-45 refers at the heading of each page to the phrase liquidation valuation. Is there any difference between "Liquidation valuation" as contained in NHI-45 and "Fair market values" as contained on page seven of NHI-44?

• • • • •

[23459] A. The answer to that is "No." To clear the situation, the word "Liquidation valuation" is a name for a study and has no connotation beyond that.

Excerpts From Transcript

Q. And these values that are contained in most of the pages of NHI-45 represent your estimate of fair market value? A. That's right.

Q. In appraising the land in these various valuation sections and in these four states, did you use any standard basis for appraisal such as dollars per square foot or dollars per acre? A. Yes, sir.

Q. Can you tell me what they were? A. They can be obtained from our worksheets which are very voluminous, and then the mechanics of totalling and sub-totalling and machining came to these results which have been summarized by subsections.

Q. Did your factor in terms of dollars per acre, for example, differ from valuation section to valuation section? A. Oh, much more detailed than that. Section of zone by zone within these valuation sections and subsections.

Q. So that you used then no standard figure of dollar per acre over an entire state, for example? A. No, no. This was done section almost separation or zone by zone which there are many within the subsections and sections indicated on NHI-45.

[23460] Q. So that actually within each valuation section could be contained on most of the pages of NHI-45, there are actually subparticular valuations per property; is that correct? A. Yes, very definitely. Just to indicate I would say that they ran into the number of thousands, well over three thousand sections or more.

Q. So that it would be an inaccurate computation, for example, to divide the area as given in these tables into the price set for the land in these tables and conclude that each acre in that valuation section was valued at that figure? A. If you did that, it would only produce a numerical average, which would be non-applicable to any-

thing except the entire area times the average unit to arrive at the same result.

Q. Referring to page seven of NHI-44, your direct testimony, you state that you used as a factor in your evaluation the properties adaptability for other use; is that correct? Can you tell me how mechanically you used that factor?

• • • • •

[23461] A. I don't think the word mechanical is a proper expression to indicate how we used it.

Q. How did yon use it, sir? A. As it says, I believe, in the direct testimony, "While we made no specific study of municipal zoning we did consider the present uses of the property in the vicinity and relied on such uses as an indication of possible future uses."

Q. I take it then, sir, that the question of the adaptability of the property for a use other than railroad use was merely a general factor which went into your evaluation of fair market value? A. Right.

Q. And the same thing would be true with regard to the properties' adaptability for use in light of its surrounding land and the uses made of that land? A. Correct, sir.

Q. Is there any instance where your evaluation is based upon the use of the property for railroad use? A. None that I recall, sir.

Q. So that it's fair to say that a basic assumption throughout [23462] your evaluation was that none of this property would be used for railroad use? A. That is right, with the exception, of course, of M.B.T.A., which is in itself a rail use as the projection of the M.B.T.A. operation.

Q. Are there any other exceptions? A. None that I know of, sir.

Q. I recall an instance of a tunnel in Providence? A. Right.

Q. Would that be an exception? A. That was not a railroad use, sir. We expected that to be a rapid, let us say, a bus line. They only have bus lines, and in effect a highway advantage.

Q. Is there any instance where your valuation was based upon the use of the property for any further transportation use? A. Other than the possibility of the one in Providence, I know of none.

Q. So that in no instance did you take into consideration the possibility of the use of the railroad's land for highway purposes? A. That is right. I think that is so quoted on the last paragraph of page six, direct.

Q. Now, on page seven, the second paragraph on that page, that is, page seven of NHI-44, you state, and I quote, [23463] "Property whose title was shown by the records of the railroad to be questionable was discounted 50%."

Can you tell me what properties were involved in those discounts, sir? A. I cannot literally identify each one without the two thousand maps which back up this liquidation—so-called liquidation study. And on those maps we have indicated when we considered the valuation of the property identified in a preliminary manner the areas in which existing title rights are limited to easements for railroad purposes.

Q. Do I understand that to mean, sir, that when you said in your direct testimony that title was questionable, you were actually meaning instances where the—it appeared that the railroad only had an easement over the property and not clear fee title? A. That is right.

Q. I take it these instances of—referring again to these discount—strike that.

Excerpts From Transcript

Referring again to these instances of questionable title properties, that these properties have always been carried on the books of the railroad as if they owned clear fee title? A. On the books of the railroad they would be carried at the cost. On the maps that we have we indicate our rights within the property lines even though it may not be perfect.

[23464] Q. When you say you indicate those rights, you mean those maps indicate those rights to be a fee title even though it is not; is that correct? A. They are not indicated any different than where we hold fee, but there is no claim by inclusion between the lines.

Q. If I looked at one of these maps, all the property on that map would appear to me to be owned in fee by the railroad; is that correct? A. It would appear to indicate that we held the rights to run a railroad within those property lines. The interpretation beyond that is a little doubtful.

Exam. Present: Would this be an appropriate time to break or do you have something on the same order.

Mr. Pollack: I have something on the same order.

Exam. Present: Go ahead.

Q. In making these evaluations did you search the title for each piece of property which you considered here? A. We did not make a so-called title search but we have a schedule of title which gives an indication without going back to the actual title search which could become very involved, time consuming and all depending on what the conditions of the right to run a railroad may have been, whether there was a reversion, whether there was not or

how it may have been set up. So, we just took our indication by our title schedule that such land was questionable. We did not [23465] go beyond the fact that it was questionable and therefore used a 50% discount because the title was questionable.

Q. So that the company maintains what you have called a title schedule at all times; is that correct? A. That's right.

Q. This was a regular part of the company records? A. They are part of the valuation records.

* * * * *

[23536] *Cross-Examination by Mr. Isaacs:*

Q. Over what period is it anticipated in reaching that figure of $260,000 total expenses that this property in Massachusetts would be disposed of? A. These are readily saleable properties and I took a year's taxes, to be disposed of within a year, a year and a half, very quickly.

* * * * *

[23593] * * *

Q. Did you direct all of the appraisers whose figures you incorporate in your Exhibit NHI-45 to base their valuations upon the same assumptions? A. Again in general, they were furnished the same ground [23594] rules in effect.

Q. Well, can you state what different ground rules were given to any of them? A. For a comparison, I have a memorandum that I believe sets forth the general ground rules. I have never made the direct comparison with the statement that was made in Mr. McCann's appraisal.

Q. Can you then read for the record the ground rules that you applied yourself and told the other appraisers whose figures you used who apply? A. Yes, I believe I can.

Excerpts From Transcript

Here is a memorandum that I made on October 27, 1966 in which—and which were furnished copies to Meredith & Grew and also Arthur McCann under date of October 27th.

And I read as follows:

The following are the principal factors considered or assumptions underlying my evaluation of the real estate properties, land and buildings of the New Haven on liquidation.

1. Consideration was given to comparable known sales in the area.

2. Existing railroad tax valuations were considered.

3. While no detailed study of zoning requirements were made, knowledge of present uses of the property in the vicinity were relied upon.

[23595] 4. Base conditions of title is shown by railroads' records were considered. Property of poor title was discounted 50 percent.

5. The study analysis was segregated by ICC's original 15 valuation sections and subsections.

6. Estimates were based upon a consideration of market value on a normal basis with normal sized parcels, i.e., excluding abnormal situations such as those for Massachusetts transportation or other purposes where continuity of ownership is required. The only exception to this was the case of certain lines and segments of lines under option 10 MBTA. It was assumed these options were exercised. In the latter case not only buildings, but other structures were included at the option price used in the study.

7. Topography of the railroad's property was considered, i.e., cuts, fills, embankments, et cetera. No value was placed

upon buildings of less than a thousand square feet of ground area.

That is a memorandum of a portion of the ground rules?

Mr. Bleakney: Just for clarification, if I may, Mr. Examiner, the witness referred to an ICC 15 valuation, if I heard him correctly. I wonder if he could clarify that.

Exam. Present: Could you explain that, Mr. Thompson, please.

The Witness: Yes. That was under 5. that we referred [23596] to that and I begin, quote: The study analysis was segregated by the ICC's original 1915 valuation sections and subsections.

Q. Did you also assume as Mr. McCann did that all real estate tax exemptions ceased as of December 31st and taxes became fully payable on January 1, 1966?

Payable is the wrong word, Mr. Thompson. And taxes—the property, became fully taxable on January 1, 1966. A. Yes. May I continue with an additional memorandum of counsel?

Q. Yes. A. Which was furnished Mr. McCann and Mr. Mason under date of October 25, 1966.

Subject, New Haven Railroad Liquidation Study, re: Certain Factors to be Assumed in Estimating Time for and Costs of Disposal of Real Estate.

1. All common carrier operations on the New Haven have ceased.

2. All real estate tax exemptions or concessions for which the New Haven now qualifies by virtue of its status as an operating railroad would no longer be in effect.

3. Approvals of individual sales by the Reorganization Court would still be required.

4. Present staff of the railroad's real estate and law departments would be utilized to the extent possible in [23597] progressing and concluding sale of transactions. To the extent that staff would not be able to handle the volume of work involved in liquidation outside assistance would be retained.

5. The schedule of removal of tracks would be as estimated by Mr. Finch, the System Vice President, Planning and Research.

6. Outside appraisals would be required to support sales of higher value properties.

7. No sales of right-of-way, et cetera, for use for railroad or Massachusetts transportation purposes are to be assumed other than in those limited areas where MBTA now holds options.

Q. And those two memos form the basis of your own appraisals and that of the others whose figures you incorporated? A. Those were basically the ground rules as set forth in the studies.

* * * * *

[23643] * * *

Cross-Examination by Mr. Kernan:

Q. Mr. Thompson, is it fair to say that on a relative basis liquidation costs of the Harlem River division properties would, in your opinion, be substantially lower such costs with respect to the balance of the properties of the system because of the brief estimated liquidation period? A. Are you saying in a comparison with the entire system?

Excerpts From Transcript

Q. Yes, sir. A. Personally, I might be of the opinion that the six-year [23644] liquidation of the New Haven's properties is in my opinion quite optimistic.

Q. Yes, sir, but my question was contrasting the Harlem River Division properties in general with the other properties of the system, wouldn't you expect that they could be liquidated in the periods that Mr. McCann has estimated? A. Let me say this on that answer to that question. This figure of liquidation time of Mr. McCann is a part of the 24 million dollar liquidation cost and also Meredith & Grew, who is a gentleman witness here, determined a period of six years for the balance of the property. So on that basis, they are comparable.

Q. You have testified, Mr. Thompson, on page 10 of NHI-44 that the July 31, 1964 valuation of the real properties showed a total liquidating value of 95 million. A. That is right.

Q. And the December 31, 1965 valuation, 114 million? A. Approximately 114 million, right.

Q. On page 11 of that exhiibt you testified that the different results are basically attributed to inherent differences between a quick estimate and a detailed analysis. A. That is right.

• • • • •

[23670] *Cross-Examination by Mr. Perkins*:

• • • • •

Mr. Bleakney: Subject to check by the witness, Mr. Examiner, I think this is a correct statement, that the 8 million dollar figure relates to discounting by Meredith & Grew for property that was still on hand in the last two years of the assumed liquidation period which would have to be sold at a discount to get rid of it. And in adding up the total values Mere-

dith & Grew computed, it used that discount figure rather than the gross figure which would have been some 8 million dollars higher. The figure in Mr. Gordon's study is the gross figure and the discount is reflected in liquidation costs rather than as a deduction rate at the outset from gross value.

[23671] Exam. Present: Do you mean the gross figure Mr. Mason was using was around 87 million instead of the 79 million on page 14 of his testimony?

Mr. Bader: You can find the figures at page 13 of Mr. Mason's testimony, sir. He doesn't do the calculation but I—but you can find out what he discounted.

Mr. Bleakney: Yes, your statement is correct, Mr. Examiner. It would be approximately 87 million. The discount is roughly 8 million. It is actually 8,177,000 plus, as indicated as someone mentioned, at page 13 on Mr. Mason's prepared statement.

Exam. Present: Does that satisfy you, Mr. Perkins?

Mr. Perkins: I think that does.

To repeat the explanation, the 79,113,000 would be increased if you added back the amount of the discount and that in fact Mr. Mason was viewing the gross amount, but the figure that he shows on page 114 is net after that reduced valuation, or rather after that subtraction for the discounting of the fifth and sixth years, is that correct?

Mr. Bleakney: I think counsel said 114. I think you meant page 14, did you not?

Mr. Perkins: I thought I said it. Page 14.

Exam. Present: Is that correct, Mr. Bleakney?

Mr. Bleakney: That's correct so far as I am concerned.

The Witness: I agree.

• • • • •

[23674] Q. Now, for the ten-year study, the estimates of expenses were entirely your own so far as real estate is concerned? A. That is right.

Q. And for this purpose you assumed that 50 percent of the appraised value would be sold in the first five years, is that correct? A. Right.

Q. Do you have any basis for the belief that 50 percent could be sold in the first five years? A. This is a forecast of future and this is based on our experience in disposing of railroad properties and the sales that we have made of them, and on that basis we believe that—Of course, the more valuable or the properties that had better market values would be disposed of first and relatively rapidly, and on that basis we decided, as we did in the first study, after talking amongst our own group and with counsel, that these were fair assumptions to make on a forecast of an estimate of liquidation.

Q. If you were wrong by even a year or two on the average, which I would assume would not be difficult to be, would selling costs be materially increased? A. That, again, is a hard question to put a yes or no answer to it. As we discussed and thought about this [23675] problem based on our experience, these seemed to be the most realistic base that we could use, whereas the other parties like Meredith & Grew and McCann estimated that the properties would be disposed of within a six-year period. We felt that that was quite optimistic. From our experiences, the volume of sales and so forth would necessitate a longer period to actually physically handle the transactions that were necessary. And we came to the conclusion that the most optimistic approach that we could make was a ten-year base in which we had estimated that 50 percent would be sold in

the first five years and another 25 percent in the next five years, and then using a slang expression, the cats and dogs would appear and we would have some discounting to do, and that is the completion or the basis of our liquidation period and costs are determined by those factors.

Q. My next question is purely a factual one, not going to the question of judgment as to timing, but let us make the assumption that even on your assumptions you turned out to be wrong or on anyone else's let's say. Let's take, for example, on your, let's assume that instead of a 50 percent being sold at the end of five years, 50 percent was sold at the end of seven years. Would that result in a material increase in liquidation expenses? A. The longer the period and the slower the liquidation, obviously the tax charges are going to be very much changed [23676] and presumably increased unless we have some change in the future taxation.

• • • • •

[23705] Q. As to the assumption of a ten-year liquidation in the 1964 [23706] study, I take it that was your own determination or as an assumption, is that correct? A. That was, I believe, on the same basis as was the '65, with the same percentages being used for the periods and so forth.

Q. But the selection of the ten-year period was your own; I assume that was left up to you as to the selection of the proper period? A. That is my opinion, that it could be done in the most optimistic manner in about not less than ten years.

Q. As I gather from your earlier testimony, you have no reason to change that opinion now, that that was your opinion in '64 and that it's still your opinion? A. That's right.

• • • • •

Excerpts From Transcript

Cross-Examination of Frank E. Mason,
Witness for the New Haven Trustees

[23754] *Cross-Examination by Mr. Pollack:*

Q. Is it fair to say then that the railroad's track removal program was a major factor in determining what parcels of property went into your first-year sales column? A. I don't believe it was a major factor, no. I don't believe so.

Q. What other factors entered into your determination, sir? A. Well, as I mentioned before, the general marketability of the property was the principal consideration. How long would it take to sell each of these parcels.

Q. How did you determine that? A. This was simply an exercise of judgment.

Q. Did you go down through a list of the property zone by zone and exercise your judgment as to each zone? Is that how you did it? A. Yes, sir.

[23755] Q. Was that how you arrived at the particular parcels of property which appear in years 2, 3 and 4 of Appendix A? A. Yes.

Q. Are the majority of parcels listed under year number one which you have numbered at 141 parcels, in any one particular area? A. I think it's fair to say no to that. These are scattered pretty much throughout the railroad.

Q. Could you tell me whether a majority of those 141 parcels are in any one state? A. I really don't know. I would guess probably not, but I really don't know, but with some checking we could make that determination. We have the information.

Q. Well, do you have a list in your worksheets of the 141 parcels which you have listed as sales or prospective sales for the year one? A. Well, we have this information on the 141 but it's included with all of the other parcels.

It has not been segregated. We would have to really dig this out for you.

Q. You mean you didn't make a separate list of the 141 parcels for purposes of adding up at least the valuations? A. No.

Q. Did you make a check mark or a number or a red mark next to those particular properties on a master list of some kind? [23756] A. Yes.

Q. Which of those type of indices did you use? A. I'm sorry. I don't understand.

Q. Did you use a check mark or a number 1 in a circle? How did you indicate on your worksheets which pieces of property— A. I'd say generally a number 1.

Q. So that on a master list of 1,687 parcels, you placed next to a particular parcel the number indicating the year in which you thought that parcel could be sold, is that correct? A. Well, we did better than that. We did this to 3,012 parcels.

Q. But that is about what you did? A. Yes, sir.

Q. Do you have that master list? A. Not with me, no.

[23757] Q. And I take it from what you said previously you have no extracts from that list by year? A. We do have a couple samples. We brought with us some samples. We do not have all of these worksheets with us. We have some samples which actually are copies of sheets received from Mr. Thompson, set up by his zones. We have applied our marketing time to each zone. We also have with us— well, we have many summaries which have to do with the number of parcels segregated by years with the market value and the tax load and separated by each community by valuation section.

Q. And those are in effect samples of what you did for the entire system; is that correct? A. That's right.

• • • • •

Q. Mr. Mason, when you testified that the determination of what year the property could be sold was a matter of your judgment, can you tell me what elements went into the making of that judgment by you? A. Yes.

This is simply a determination or estimation of what [23758] the market appears to be for this type of real estate.

Q. Did you or someone from your office make a physical examination of each of these parcels? A. No.

Q. From where did you get the information as to what "Type of real estate this was"? A. Well, the portions of the real estate that we were primarily concerned with were those sections that represented the higher values. Most of these we—many of these we were familiar with, many of them we re-examined. In addition to that we found that if not impossible at least difficult to make a field survey or a field view of all of the property, particularly some of the rights of way out in the country, and particularly some of the old abandoned rights of way that are pretty hard to find sometimes.

We did obtain about 250 United States Geodetic survey maps and followed the contour and the general physical characteristics surrounding these rights of way on those contour plans.

Q. Is it safe to say then, Mr. Mason, that as a general rule you took Mr. Thompson's valuations and looked to the properties containing the highest valuation first? A. This is our principal concern, and we did not just accept his valuations.

Q. I understand that. Whether you accepted it or not, [23759] that is the general way in which you approached the study of these particular properties? A. That's right.

Q. Referring again to sheet two of appendix A to NHI-58, can you tell me how you determined the expenses entitled "Real estate department"? A. Yes.

Basically this information has to do with information which we obtained from Mr. Thompson, which I considered to reflect his experience in running the railroad's real estate department. We were able to make some estimates of the cost of running the department on a liquidation basis or in liquidation, or assuming that the real estate department is devoted to the handling of the disposal of the property based on the figures that we obtained, it appeared that this could be broken down to a unit basis which would reflect approximately $1,000 per sale. Of the real estate department cost, of the real estate department operating expense, approximatly 40% of the staff. is engineering. This is 12 men out of a total of 30 on the staff.

We believe that some of the sales would require somewhat more engineering and therefore more engineering expense than had been Mr. Thompson's previous experience with his usual sales. We therefore increased the engineering cost by 50%, which gave us a total unit cost of $1200 per sale, and [23760] the application of $1200 times the number of sales involved produces the figures shown on sheet two.

Q. Can you tell me what unit was used in determining the number of sales, that is, are they zones, map zones, valuation sections or what unit? A. You mean, the number of sales that are listed here?

Q. That's correct. A. Well, as I outlined in my testimony, it appeared to be fairly simple to adopt the number of zones which Mr. Thompson had used to indicate the total number of sales. We do not think, at least in all cases, that the zones are set up on a marketing basis but a reuse

study of the entire railroad would have been quite an undertaking, and frankly we didn't have the time to do it and it didn't seem necessary anyhow. We did make some checks in a few comments as to how we would market the land in these communities, how we would separate the land, how many sale areas we would have. In some communities we found that we had somewhat less than the number of Mr. Thompson's zones and in other cases we found we had more than the number of his zones, and we considered that this would probably balance out pretty well so that his total number of zones would be reasonably indicative of the number of saleable parcels.

Q. Just to make that clear then, you have the total on sheet 1 of appendix A under the number of sales of 1,687. I [23761] take it then that this is 1,687 zones as that word was used by Mr. Thompson? A. Not exactly. As I mentioned before, we had a total of 3,012 zones. The number of sales listed for years one through four correspond to Mr. Thompson's zones. The number of sales for years five and six were consolidated from 1625 zones to 300 saleable parcels.

• • • • •

Cross-Examination by Mr. Schreiber:

[23784] Q. On the same page you describe these discounted properties as being isolated from highways, inaccessible to adjoining land because of the grade of the terrain and likely to have a market restricted to one or two adjoining owners.

Can you identify such New Haven properties or are they hypothetical properties? A. This would apply to a very large percentage acreage and mileage wise to the New Haven Railroad. This is the type of property you

find outside of the urban areas in general. This is the narrow rights of way, the so-called five rod strips which are often wider, sometimes narrower, difficult so far as utility is concerned because they are generally long, narrow pieces of land and—I have estimated that they cover about 19,000 acres.

Q. But isn't the definition you have given of those properties that they would be—that they would remain unsold at the end of the fourth year? A. Yes, that's right.

Q. Do you know now what properties of this nature will remain unsold at the end of the fourth year? A. Could I have your question again, please.

Exam. Present: Would you read the question, please.

(Whereupon, the last question was read.)

A. Well, so far as my estimate is concerned, the whole [23785] 19,000 acres.

Q. Are they specific acres or are they hypothetical acres? A. They are very specific acres.

Q. You mean you can now describe by metes and bounds what is going to be left over at the end of four years? A. Yes.

Q. These properties we are talking about were reported to you by the New Haven, were they not, as part of a total of about $87,000,000? A. Yes.

Q. How did you know that the New Haven in arriving at those market values with respect to such properties had not already discounted them sufficiently itself for the disadvantages you have mentioned? A. I discussed it with the New Haven Railroad.

Q. Who in the New Haven Railroad? A. Mr. Thompson.

Q. What did Mr. Thompson say about it? A. He had not discounted them to the extent that I considered necessary in order to market them within our liquidation period.

Q. You say to the extent. Do you know how much he had discounted them? A. So far as I recall, he had not discounted them at all.

• • • • •

Cross-Examination by Mr. Perkins:

[23795] Q. And you testified you have used 6 percent, is that correct? A. Yes.

Q. In your opinion, is the value of real estate dependent in part on the economy of the area in which it is located? A. Yes.

Q. Lieutenant Governor Sargent testified, as I noted to Mr. Thompson, that in his view the economic impact of the loss of the New Haven Railroad on Massachusetts would be staggering.

Whether or not you agree with the adjective, would you agree that there would be an adverse economic impact on Massachusetts? A. Yes.

Q. The same for Connecticut? A. Yes.

Q. And Rhode Island? A. Yes.

• • • • •

Cross-Examination of William G. Kirk, Witness for the New Haven Trustees

[24316] • • •

Cross-Examination by Mr. Bushby:

Q. Mr. Kirk, I have read your statement of your qualifications in the early part of your direct testimony, being NHI-65. It seems to me and I would like to ask you

if you haven't skimped on your qualifications as an expert securities analyst. Haven't you been too modest? A. I think that's something for you to judge, Mr. Bushby. I don't feel I have.

Q. Well, I would like you to— As I understand it, you are President of John P. Chase, Inc.? A. That's correct, sir. And it so states.

Q. Isn't that the investment advisor to a number of large investment companies? [24317] A. Correct.

Q. Would you give the names of those companies? A. We are investment advisors to Shareholders Trust of Boston, of Balanced Open-End Mutual Fund distributed on a nation-wide basis.

We are investment advisors to the Chase Fund of Boston, likewise an open-end mutual fund devoted to growth in capital which is distributed throughout the nation.

We are investment advisors to a group of companies called Unified Funds domiciled in Indianapolis, and we are investment advisors to two or three non-registered investment companies that operate in Europe, but nonetheless invest in American securities.

Q. Would you state the asset values, the total asset value of the funds which you advise? A. Shareholders Trust of Boston has a total net assets of approximately $82 million.

The Chase Fund assets will run in the order of 35 to 40 million.

Unified Funds will run in the area of 35 million.

The overseas funds not distributed in this country, in the order of magnitude of 30 million.

Q. Now, in the course of your business you from day-to-day analyze investment securities, do you not? A. This is correct. I am not and haven't for sometime [24318]

functioned as a so-called security analyst. I am Chairman of the Policy Committee of my firm which reviews the recommendations of our research department. And you have your own individual opinion of the value of Penn-Central securities— A. I do.

Q. It doesn't differ from Mr. Roehl's opinion, does it? A. Not particularly, no. Not in that area that he speaks, some five to eight years from now.

Q. In view of the testimony that it will take five to eight years for the benefits of the Penn-Central merger to develop, do you not think it fair and equitable that the consideration to be received by New Haven from Penn-Central, that the distribution of that consideration be postponed for that period? A. I think this is a separate consideration from what I am purporting to talk about here, namely, the value of this consideration at the time of the conveyance.

Now, what happens thereafter is a problem aside, but nonetheless of course, important in the overall reorganization of this property.

Q. Well, do you not think it fair and equitable that distribution be postponed until that value is ascertained? A. My own judgment would be that the value of the consideration in the form to be received under this agreement will [24319] enhance in value over the years, and will be in the order of magnitude as discussed by Mr. Roehl in these proceedings.

* * * * *

[24330] * * *

Cross-Examination by Mr. Plimpton:

Q. Mr. Kirk, on page 6 of your Exhibit [24331] NHI-65, you mention the economic effect on Southern New England

of a termination of operations of the New Haven. What in your opinion would be the economic effect of such a termination? A. The economic effect would be bad. I don't know how to characterize it in terms of adjectives. It would be bad in two ways. It would be bad in the sense that the competitive position of the companies in our area which require the service of the New Haven Railroad would be impaired. Secondly, because their condition would be impaired, they might seek to conduct their operations elsewhere, where they could get the service for the kind of business they operate demanded, and this, in turn, would adversely affect even the New Haven Railroad's ability to obtain any kind of price for the properties they were liquidating by virtue of the increase in the supply of such properties which would be occasioned by that kind of development.

• • • • • •

[26019] • • •

Mr. Isaacs, did you distribute that map at the close of the hearing yesterday?

Mr. Isaacs: Yes, I did, Mr. Examiner, and I would like to have it marked for identification.

Exam. Present: This is the map which was mentioned in NHI 55, is that right?

Mr. Isaacs: Yes, and at pages 24,382 and following pages of the transcript, as well as at the close of —during the hearing yesterday afternoon.

Exam. Present: All right. We will mark that as Counsel's Exhibit and the number will be NHI-107.

• • • • • •

There being no objection, NHI-107 is received in evidence.

• • • • • •

Extract From the Brief on Behalf of Manufacturers Hanover Trust Company, Filed With the Commission on June 5, 1967, pages 40, 46, 47-48:

* * * * * *

[40] C. Penn-Central is Purchasing Property that is actually in Operation and Which Will be Continued in Operation and hence the New Haven must be Compensated for the Going Concern Value of such Property.

* * * * * *

[46] The mortgage Trustees introduced a study made for them by William Wyer, President of Wyer, Dick & Co., transportation consultants, which showed that it was feasible to operate the New Haven profitably as a freight-only railroad and that such a railroad could generate sufficient income from the sale of surplus property and from its annual net income to make the necessary improvements.

Mr. Wyer showed that with aggressive and experienced management, using modern operating methods, the New Haven as a freight-only railroad could produce income available for fixed charges of almost $9.5 million per year (based on 1964 operations normalized) and almost $7 million (based on 1965 operations normalized) (NHI-102, Tables 1, 3).

* * * * * *

[47] It is our position that the most economical and best use of the New Haven as an independent railroad is as a [48] freight-only carrier, and that it is entitled to be operated in that fashion and to be freed of its confessedly uneconomical passenger operations. And it is further our position that if the public necessity is deemed to require maintenance of passenger service, such service can only be required upon the payment to New Haven of adequate compensation fully covering the cost of such passenger service,

i.e., including both the passenger deficit and the lost profit from freight operations,—but that is not the issue in this case.

What is important here is that the New Haven can be operated profitably as a freight-only railroad and is entitled to be fully subsidized if it is required to continue passenger operations—and must be valued in that light in these proceedings.

What Penn-Central, and the New Haven Trustees, apparently disregard is the consequence of that fact in this proceeding: (1) that the New Haven cannot be regarded, in Mr. Grant's phrase, as a "burden," (NHI-71, p. 3) but as a potential source of net income to the merged system; and (2) that the New Haven, because it can generate net income for Penn-Central, is clearly entitled on a sale to receive compensation as a going concern intended to be continued in operation.*

---

* Of course, even a business that is not profitable may have a substantial going concern value. *Kimball Laundry Co.* v. *United States, supra; cf. Matter of City of New York (Fifth Avenue Coach Lines), supra.*

Extract From the Brief on Behalf of the Chase Manhattan Bank, Filed With the Commission on June 5, 1967, pages 51 and 55:

(D) *The Wyer freight only study and the Shannon going concern value study show that the New Haven as a freight only railroad would have substantial earnings and a substantial going concern value.*

In trying to support a low valuation for the New Haven assets, the plan proponents point to the reported deficits in earnings of the New Haven in recent years, including the period of the present Section 77 proceeding. In addition, for the same purpose, the New Haven Trustees put in evidence a freight only study by a New Haven officer (Mr. Finch) which purported to show a deficit in income available for fixed charges for the New Haven in 1965 on a freight only basis (NHI-59 and NHI-60).

This Finch study was refuted by Mr. Wyer's testimony and exhibit which were put in evidence by the First and Refunding Mortgage and General Income Mortgage Trustees (NHI-101 and NHI-102) and which showed income available for fixed charges on a freight only basis of $9,452,000 for 1964 (NHI-102, Table 1) and of $6,979,700 in 1965 (NHI-102, Table 3).

* * * * *

On all counts, it seems to us that Mr. Wyer's views as to the earnings results of a freight only railroad should be accepted as against those of Mr. Finch.

Extract From the Brief of the New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee, Filed With the Commission on June 5, 1967, pages 43, 44:

* * * * *

* * * [43] There has been substantial testimony in this proceeding primarily by Mr. William Wyer, that the New Haven, operated as a freight-only railroad, is capable of profitable operation. (NHI-101, NHI-102). Although Mr. Wyer's testimony was disputed by that of Mr. James M. Finch of the New Haven (NHI-59, NHI-118), who believed that a freight-only operation could do no better than break-even in the foreseeable future (NHI-118 p. 62), there is no question but that a freight-only operation would be a substantial financial improvement. In addition, there is every reason to respect Mr. Wyer's expert opinion, for he is one of the most experienced transportation efficiency experts in the nation and he was not, like Mr. Finch, in a position which required him to defend the efficiency of the New Haven's present operations.

* * * * *

[44] The *Fifth Avenue Coach Case* and the *Kimball Laundry Case* discussed above, support the proposition that going concern value represents asset value that must be paid for in condemnation, even if the business is losing money. In the instant case, where the Commission must find not the bare constitutional amount as in condemnation, but the fair value that a seller is entitled to receive, it is even clearer that valuation of the New Heaven must include its investment in creating and maintaining the company. Certainly, it cannot be denied that Penn-Central will acquire these intangible assets in the proposed transaction.

[27484] • • •

Oral Argument Before the Commission June 15, 1967

By Mr. Auerbach:

• • • • •

A second question involved in the Grand Central Terminal agreement is whether the New Haven is entitled to participate in net income from the properties. This question was historically academic because until 1964 and then in 1965 for the first time you had net income. New York Central has refused to permit New Haven to share in that net income and the New Haven has brought litigation in both of those years. These two phases which I have just mentioned, that is to say the book value for claimed unreimbursed construction costs and the right to participate in income, are, however, in the trustees' views peripheral issues. The principal issues are what are the New Haven legal rights under the Grand Central Terminal agreement and if they have them, what are they worth. When the trustees were appointed, the New Haven was then in litigation with New York Central involving the Hotel Biltmore. The management of the New Haven, prior to bankruptcy, announced publicly that New [27485] Haven had an interest in the Grand Central Terminal properties which ran to hundreds of millions. Messrs. Sullivan and Cromwell, of New York were then representing the management and the trustees included them in that litigation and they brought the case to a successful conclusion. But the Court in that case did not determine questions important for the trustees' future course or for the issues now before the Commission. The trustees thereupon propounded various questions to Sullivan and Cromwell in order to arrive at a course of action. The July 16, 1964 opinion of those Counsel is in the record in this case. It contains both the questions and the opinions then given by Counsel. In brief summary, Counsel would not say that the trustees had any rights un-

der the Grand Central Terminal Agreement if the New Haven ceased to operate passenger service into Grand Central other than to be reimbursed possibly for the past building advances to which I have previously referred. They also would not say that the New Haven had a fee interest in the property. They did say that the New Haven had a right to participate in Grand Central earnings so long as it continued to use Grand Central Terminal and that its participation would be based upon its ratio of car use to total car use. They also said should there be net income, and bear in mind at the time of their opinion there had never been any, that should there be net income from Grand Central properties, New Haven should be entitled to participate in the net income. That is [27486] the matter as to which I have indicated the trustees have already brought suit.

Now, as Trustee Smith testified, based upon these answers of Counsel, the trustees then had to decide whether to pursue further litigation on the question of whether New Haven had a legal interest or what that legal interest might be in Grand Central or, in view of the opinion, not to pursue the matter further. They decided that further litigation would not be worth the attendant expense. Obviously, it would have been far easier for them at that time merely to authorize Counsel to proceed with litigation. Now if, contrary to that opinion which I have summarized, the New Haven has a disposable interest in Grand Central Terminal properties which is severed from the obligation that the New Haven continue to operate passenger service into Grand Central Terminal, that interest would be extremely substantial. According to the trustees evidence in this case, the value of the properties involved is $227 million dollars and the trustees will say to you if they are wrong in their view of Grand Central, then their solution, their settlement

with Penn-Central is also wrong because we don't in that settlement get any share of that $227 million. We are settling it for a relatively modest amount.

Now apart from questions of severable legal rights, in view of this opinion of Counsel, the trustees also had another point to consider and that is in view of the value of the properties [27487] and the possible income from the properties, did it make sense as a matter of reorganization to continue to operate the New Haven as an independent passenger railroad into Grand Central because that Counsel said clearly was covered by the Agreement.

[27488] Now if you have $227,000,000 and anticipate the income from that property and the question is if you operate a passenger service in order to participate in that income, should you continue to do so. The trustees, as trustee Smith testified in great detail, considered this, but that is subsidized passenger service by New York and Connecticut. The trustees concluded that if they continue to operate into Grand Central merely to participate in the income from the properties and to do that, of course they would also have to go into the litigation I just referred to, but if they did that, would the states continue to subsidize the New Haven, and the trustees concluded that if that were he only purpose of the operation, obviously the states would demand to be credited with that income. If the states would be credited with that income against the subsidy, then there was no point in the trustees pursuing that course.

* * * * *

Exhibit TPR-1

Prepared Testimony of William J. Kirk a Witness for the New Haven Trustees

* * * * *

—10—

Whether claims are treated on the basis of some allocation of segments of earning power or on the basis of segments of a capital structure which itself is based upon estimated earning power, mere difficulty in arriving at knowledgeable opinions has not been a bar to a prompt distribution of underlying securities. The facts in the present situation, which would require a valuation of the Penn-Central stock many years hence, obviously present difficulties. Because of the many unknowns, however, all estimates of earning power would be subject to frailties which must make one cautious in their use at this time as the foundation of a fair plan.

The facts which we believe compel this conclusion include the following. There is no reliable basis at this time on which an estimate of the financial benefits of the merger of Central into Penn can be made. In 1962, Penn and Central estimated that the merger would produce annual savings of approximately $80 million, which the Commission essentially accepted in connection with weighing the benefits to the public from the merger. Apart from whether that estimate will prove correct, the record is clear that the applicants considered that the full amount of such savings would not be achieved until the eighth year of the life of the merged company.

—11—

However, the basic savings estimate, in our view, has always been highly conservative. In our brief to the Ex-

aminers on June 1, 1964, we made clear we felt considerable additional savings had been either overlooked or disregarded by Penn and Central. We felt that the savings should, as a minimum, exceed $100 million annually, and in our own private discussions we believed that the potential savings could easily reach $150 million per year.

In addition, apart from savings, we were convinced that the merged system would have a tremendous impact upon intermodal competition. We could not then or now, however, estimate the increased traffic which such a system could recapture from motor carriers, water carriers and even air carriers. Whatever is recaptured could produce substantial net income to Penn-Central since a great deal of such revenue would be of an incremental nature. Not only are we in no position to estimate this benefit but we question whether even the staffs of Penn and Central could now make an informed appraisal.

In addition, there have been other intervening considerations of possible substantial consequences since the savings evidence was submitted five years ago. For example, what will be the cost to Penn-Central of the Appendix G conditions in favor of Erie-Lackawanna, Delaware & Hudson and Boston & Maine? Will there be an actual out-of-pocket cost? Will the conditions of Appendix G postpone for an extended period the achievement of operational savings or the benefit of increased traffic which could be recaptured from other modes? If any of these conse-

quences should occur, how should they be translated into impact on Penn-Central earnings?

What will be the actual impact of a labor protective agreement which is based upon attrition rather than the

previously standard formula? Can this provision be realistically appraised without experience over an extended period of time? Apart from the cost of these labor protective provisions, what will be the impact of the two subsequent rounds of wage increases upon the savings estimated in 1962? And what further wage increases should now be estimated in the eight years before the savings would be achieved?

What would be the consequences for the merged system of integration of New Haven's operations? All previous estimates of savings have indicated that approximately $5 million could be saved in New Haven's costs of operations. If this, in fact, should be the result of New Haven's inclusion, there would remain substantial operating losses which would have to be reflected in the over-all estimate of Penn-Central. On the other hand, I have personally always felt that with the expert management available in the Penn-Central proposed organization, together with the obvious savings to which the various witnesses testified, there should be savings in New Haven's operating costs considerably in excess of $5 million annually. It has never been possible for the Trustees to have a study made which could establish the ultimate effect of the New Haven's inclusion on the Penn-Central system. I have never felt that New Haven's inclusion would produce substantial net

income for Penn-Central. I believe, however, that the New Haven's operations might prove to be without burden to the Penn-Central system. I think this conclusion would depend on whether the New Haven, as part of the Penn-Central system, could produce business which it does not now have or could save business which would otherwise be lost by Penn-Central. I think that both of these results

could occur, but we neither have a study nor could we make a study which would have evidentiary weight on these points.

What will be the effect upon the merged system of the diversified investments of both Penn and Central which have occurred since the evidence in the merger case record as to rail operations was completed? Penn, in particular, has radically changed the nature of its business through the addition of pipe line operations and various real estate and public recreation enterprises. Even apart from the direct benefits on the income statement to be derived from the diversification program, there are indirect effects. What will be the impact upon the future valuation of an enterprise whose earnings are only partially derived from rail operations in contrast to one which relies almost wholly on rail earnings?

How long will it take Penn to complete the divestiture of its interest in Norfolk & Western? How rapidly can the proceeds of the divestiture be advantageously invested? Will the proceeds of this potentially tremendous fund of capital by any standard be applied to carrier activities or to further diversification, and what will be the effect of such applications?

What will be the effect upon the Penn-Central system of

the completion of even present proposals for the restructuring of railroads in the Eastern District? What would be the effect of a merger of Chesapeake & Ohio and Norfolk & Western?

Apart from the final structure in the Eastern District, there are now in process proceedings which propose a

substantial revamping of rail systems west of the Mississippi and, in part, even east of the Mississippi.

What will be the effect upon the Penn-Central system of new techniques now being developed in railroading? Will labor forces require job protection by reason of new machines and equipment? What are the foreseeable limits to the use of electronic data processing in railroad operations, including the operation of both passenger and freight trains? We have seen even in the short period since evidence in the merger proceeding was first submitted, tremendous changes in specialized equipment and in the growth and nature of trailer on flat car traffic. What will happen in the next eight years in these regards?

Penn presently has the largest passenger service deficit in the country and Central's is among the largest. What will be the effect, and what is the likelihood of high speed trains, public subsidies for passenger operation of the eastern seaboard area, and possbile elimination of all passenger service beyond distances of 200 to 300 miles?

What will be the federal income tax situation during the next 8 years? Will there be special railroad legislation as there has been in the past? Will Penn-Central be able to generate tax benefits which will reduce its taxable income?

—15—

Based upon these factors, the Trustees came to the conclusion that a proper plan would be one which deferred for a reasonable period the making of decisions which could only be based upon conjecture at the present time. We believe that the period of deferral should be equated to the time required for the merged company to become truly integrated. That period has always been considered by Penn-Central to be approximately 7 years.

Exhibit TPR-1

If there is to be a deferral, it is also necessary to protect those persons affected by the deferral so that, whatever came to pass, their rights would have been properly safeguarded. There must not be a penalty imposed on waiting. Conversely, a fair plan, in our judgment must ensure that even those persons who clearly have an equity will not, as a consequence of what may happen over the deferred period, receive any windfall.

The Trustees' Plan is based upon the considerations which I have outlined. It contemplates that the New Haven will sell its assets to Penn-Central as provided in the Agreement. The Reorganized Company (the reference I employ for the New Haven following such sale) will carry on business as an investment company initially holding the Penn-Central securities vested as consideration for the sale. Whether the Reorganized Company will be the old New Haven with a new capital structure, or a new corporation with such structure, will depend upon tax and other matters not now known. These will be supplied by amendment at the appropriate time. I have in mind in this regard that if Congress should not pass legislation permitting the tax loss carry-overs of railroads being included in other

systems to become available to the successors, the particular form of future organization of the Reorganized Company might be affected.

We are, of course, aware that exemptions may be required under the Investment Company Act of 1940 in order to achieve the objectives of our Plan and to permit the capital structure we have provided for the Reorganized Company. Similarly, there will be necessary compliance with the registration provisions of the Investment Company

Exhibit TPR-1

Act of 1940 with regard to statements of investment policy and other matters which will subsequently be supplied for approval by the Commission and the Reorganization Court.

The heart of the Trustees' Plan is that the capital structure being created requires certain events to occur within the deferral period deemed appropriate to measure the worth of the securities of the merged Penn-Central system. Thus, most of the debt securities, which I will subsequently describe in detail would have a maturity of 7 years, and the Warrants would have an expiration date of 10 years. These maturities were deliberately chosen and keyed to the distributions proposed to be made under the Plan. Whatever happens in terms of the future valuation of the Penn-Central securities, those classes which have claims senior to the New Haven's first mortgage bonds are assured that their payment will come out of the assets of the Reorganized Company before a junior equity participates. If subsequent events prove that the income bonds, in fact, have no equity, the security being received by the income bonds under the Plan would have no value.

—17—

Contrariwise, if the income bonds do have an equity, and I believe that they do, then the security received by them under the Plan will have matured into such value. By the nature of the distribution, the income bonds will not have carved out of the equity of the holders of the first mortgage any value as to which the latter have priority over the income bonds.

We have tried to build into our Plan various safeguards of this type, and to provide a period which, in our judgment, would be reasonable to permit an automatic deter-

mination of the future value of the merged Penn-Central-New Haven system without requiring further valuation proceedings. We have tried to build a flexibility into our Plan, which, as experience in the operation and benefits from the merger arises, will permit the market place to value the securities being issued under the Plan. This would give those who do not wish to wait for the maturity of their securities received under the Plan an opportunity to effect a sale at any time.

We cannot scientifically measure the period which best provides these safeguards and objectives. Similarly, we cannot say that a different capital structure would not be fair. We do say that we believe that the capital structure we have formulated will produce fair treatment for all those who are affected by the Plan.

Our Plan has one further premise which should be discussed. We believe that the Penn-Central common stock to be vested in the Reorganized Company might well have a value some 7 to 10 years after consummation of the

Plan which will be in excess of $150 per share and possibly in excess of $200 per share. In reaching this conclusion, we think that Mr. Roehl's testimony in this case that the future earnings of the merged system will be upward of $12 a share and that these earnings will command a market price to earnings ratio of upward of 12 is in the area of reasonable appraisals of the whole list of unknowns such as I have previously summarized.

We know of no way to protect the equity of the income bonds other than by a plan containing the deferral and type of capital structure we have proposed. If we felt that the income bonds had no equity, it would have been by far

Exhibit TPR-1

the easiest course to have filed a plan which provided that the holders of the first mortgage bonds should have the entire Estate after payment of those claims which are admittedly prior in right to the first mortgage. We have felt that this would not be fair and we have not done so.

• • • • •

Extract From the Memorandum of Plaintiff Manufacturers Hanover Trust Company, Filed in the United States District Court for the Southern District of New York, on or about March 15, 1968, pages 46, 48-49:

• • • • •

[46] A. In the circumstances of this case, "Going Concern" value is a proper additional element of value.

• • • • •

[48] Much has been made in this case of the undeniable fact that the New Haven is not now and has not been for some years a profitable railroad. Both Penn-Central and the New Haven Trustees apparently assumed, at least for the purpose of these proceedings, that this condition of unprofitability was likely to continue under any foreseeable set of conditions. Thus, Mr. Finch's freight-only study (NHI-59, 60) concluded that, run as a freight-only railroad, the New Haven, in spite of heavy investments of new funds, would have shown substantial losses in 1965, and even greater losses in succeeding years. Mr. Grant assumed, in his testimony, that the New Haven's losses would continue, in spite of the substantial savings attributable to inclusion of the New Haven into the merged Penn-Central system (NHI-71, p. 8; cf. NHI-74, pp. 4-6).

While Penn-Central has understandably taken the position from the start of negotiations that the New Haven operations cannot be made profitable, the current position of the Trustees represents something of a change on their part. The Sullivan & Worcester memorandum of June 12, 1964, which was the initial working paper in the negotiations with Penn-Central, estimated that, as a freight-only railroad included in the Penn-Central system, the New Haven would have income available for fixed charges of about $12 million per year. (NHI-2, p. 15; NHI-3, p. 4).

Mr. Kirk used the same figure in his testimony in this proceeding (NHI-65, pp. 11, 12).

The Mortgage Trustees introduced a study (NHI-101, 102) made for them by Mr. William Wyer, President of Wyer, Dick & Co., Transportation Consultants, which [49] showed that it was feasible to operate the New Haven profitably as a freight-only railroad and that such a railroad could generate sufficient income from the sale of surplus property and from its annual net income to make the necessary improvements. Mr. Wyer showed that with aggressive and experienced management, using modern operating methods, the New Haven as a freight-only railroad could produce income available for fixed charges of almost $9.5 million per year, based on 1964 operations normalized, and almost $7 million, based on 1965 operations normalized (NHI-102, Tables 1, 3).

The New Haven Trustees vigorously opposed the creditors in this contention and put in evidence their own rebuttal study, made by Mr. Finch, Assistant Vice President, Planning and Research of the New Haven, and other employees of the New Haven (NHI-118). While the Finch study attempted to show that the operations of the New Haven as a freight-only railroad would be marginal, the effect of Mr. Wyer's testimony was to confirm the estimate made by Trustee Kirk "that the estimate of $12 million of income available for fixed charges described essentially the outside limit of the value of the New Haven if only its freight service were included" (NHI-65, p. 12).

There seems at least to be general agreement between Penn-Central and the New Haven Trustees that inclusion of the New Haven in the Penn-Central system would result

in savings on New Haven operations of at least $5 million per year on freight operations alone (NHI-74, pp. 4-6). Mr. Wyer arrived at a similar figure—$5,525,000 (NHI-101, p. 53). Of course, these savings would be in addition to the net income of the New Haven as a freight-only railroad.

Report of Special Master

(Cover and appearances omitted in printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 30226

REPORT OF SPECIAL MASTER RESPECTING DEBTOR'S RIGHT, TITLE OR INTEREST IN THE GRAND CENTRAL TERMINAL PROPERTIES

I was appointed Special Master by order dated April 8, 1968 of the United States District Court for the District of Connecticut, Honorable Robert P. Anderson, United States Circuit Judge, sitting by designation, which states:

ORDER

1. The Honorable John Van Voorhis, previously designated as one of a panel to act as special masters in proceedings under Section 77 of the Bankruptcy Act by order of the United States Court of Appeals for the Second Circuit, is appointed special master.

2. The special master shall determine whether there is a proper basis for the Commission's finding of value as to the

Debtor's interest in and to the Grand Central Terminal properties which the Commission made in its Report and Order of November 16, 1967; and to this end the special master shall determine:

(a) whether there is any additional evidence that bears upon the Debtor's rights in the aforesaid properties; if there is, whether it is admissible before the special master; if it is, to proceed to take said evidence; and, if it is not admissible before the special master, then to recommend what action should be taken relative to such evidence;

(b) without adjudicating the issue, to make a legal appraisal of the interests and rights of the Debtor in said properties, including the nature of the Debtor's interest in the event of a cessation of passenger operations in the Grand Central Terminal;

(c) to take any and all other action necessary and proper to a determination of the aforesaid matter; and

(d) thereafter to make a prompt report thereon to this Court.

This order recited the approval by the Interstate Commerce Commission of the first step of a Plan of Reorganization of the Debtor providing for a conveyance of certain of the Debtor's assets, including its interests in the so-called Grand Central Terminal properties, to The Pennsylvania New York Central Transportation Company. My order of appointment further recited that for the purpose of valuing the Debtor's rights and interests in and to said properties, as part of an overall valuation of the assets of the Debtor to be transferred under the first step of the Plan, the Interstate Commerce Commission had before it evidence that the total value of said properties was $230,000,000, and determined, *inter alia*, that the Debtor's estate has rights and interests therein that "Survive even if its passenger service into the Terminal stop"; that these rights and interests "are not frivolous but claims of substance, and in the absence of litigating them, they must be deemed to be valuable"; and valued the Debtor's interest in said properties at approximately $13,000,000. This reference, the order recites, is in conjunction with the certification by the Interstate Commerce Commission of the first step of the Plan of Reor-

ganization to the U. S. District Court for the District of Connecticut pursuant to Section 77(d) of the Bankruptcy Act.

At the time of my appointment on April 8, 1968, the said determination by the Interstate Commerce Commission, described as its Second Supplemental Report and Order of November 16, 1967, in Finance Docket Nos. 21669 *et. al.*, was under review by a Three-Judge Statutory District Court composed of Circuit Judge Henry J. Friendly, Judge Presiding, and Judges Edward Weinfeld and Richard H. Levet of the Southern District of New York.

The briefs submitted by the parties to the Statutory District Court were made available to me, and I attended the hearing of the arguments before that Court on its review of the Interstate Commerce Commission's determination on May 6, 1968. Prior to that time and on May 2, 1968, I held a hearing at the United States Court House in Foley Square, New York City, which was attended by counsel representing all of the parties enumerated above, and this continued before me at the same place on May 7 and May 8, 1968. At the conclusion of these hearings before me it was stipulated by all counsel that this reference to me as Special Master be regarded as submitted on the basis of the briefs furnished to the U. S. Three-Judge District Court reviewing the Interstate Commerce Commission, and upon the oral arguments before me on May 2, May 7 and May 8, as previously stated. All relevant portions of the evidence received either by the Interstate Commerce Commission or by the Reorganization Court (U. S. District Court for the District of Connecticut presided over by Honorable Robert P. Anderson, Circuit Judge, sitting by designation) were received by me. A few other items of evidence were received, which are hereafter mentioned, and the possible taking of further evidence is left open, as more particularly appears from the latter part of this report. Under Section 5(2)(d) of the Commerce Act, the Commission conditioned approval of the Penn-Central merger upon inclusion of the New Haven in the merged system. The Commission reserved jurisdiction, however, to provide for inclusion of the New Haven in the merged system "upon such fair and equitable terms and conditions" as it might impose, subject to Reorganization Court approval (327 I.C.C. 553). It

is the Trustees' plan, following in essentials the Purchase Agreement by Penn-Central of the New Haven properties signed April 22, 1966, which has in the main been approved by the I.C.C. in consolidated proceedings under the Commerce Act. The Reorganization Court is charged with the function of determining whether the proposed reorganization plan of the New Haven, involving its sale to Penn-Central, is fair and equitable under Sections 77 (b and e) of the Bankruptcy Act, 11 U.S.C. §205.

My authority as Special Master to hear and report is, of course, derived from the Reorganization Court. My jurisdiction extends only to the matters referred to me and could not, in any event, exceed the jurisdiction of the Court of my appointment. An argument has been made on behalf of Penn-Central and I.C.C. that the Reorganization Court is bound by all findings of value certified to it by I.C.C. under sub-section (e) of section 77 of the Bankruptcy Act, and that the $13,000,000 value ascribed by I.C.C. to the Grand Central Terminal properties is final unless it was made arbitrarily or capriciously without substantial evidence to support it. This principle is said to apply even to findings of value depending upon legal relationships of the parties, rather than upon the market values of stocks, bonds, or real estate, for the reason that the Commission is said to be conclusively presumed to possess expertise to the exclusion of the Courts in deciding questions of law which underlie findings of value. The scope of my jurisdiction will be discussed later. Suffice it to say now that I do not subscribe to the view that the Courts lack expertise in deciding questions of law, or that the determination of value in order to decide whether a plan is fair and equitable becomes under all circumstances entirely a function of the Commission. This is particularly true in situations where a conflict is presented between the duty of the Commission to meet the transportation needs of the public, and its duty to approve of valuations which are fair and equitable to bondholders whose property interests would have to be sacrificed if public transportation needs were to be satisfied through indefinitely continued deficit railroad operations. The jurisdictional question becomes academic if action by the Commission is arbitrary or is not founded upon substantial evidence.

Report of Special Master

I am called upon to report upon the interest of the New Haven in real estate in the vicinity of Grand Central Terminal, in New York City, consisting chiefly of hotels and office buildings in which both New Haven and Central have an interest that are not used for railroad operating purposes. They are situated on East 42nd Street, Vanderbilt Avenue and Park Avenue between 42nd and 57th Streets. The parties to these proceedings have apparently treated them as consisting of 19 parcels enumerated on the appraisal known as Appendix A of exhibit NHI-1 and NHI-19. They include such well known properties as the Hotels Commodore, Biltmore and Roosevelt, and office buildings such as the Pan Am Building and others. Their total value has been appraised at $227,225,000, by a real estate appraiser named Donald Macdonald, as of April 19, 1965. He was employed by the Trustees of the New Haven to make this appraisal which, although subject to controversy respecting some of the theories and data on which it is based, has not been contradicted by testimony to a different valuation figure by any other real estate expert witness. Mr. Macdonald did not attempt to assign values to the separate interests of New Haven and Central in or to any of the component properties going to make up his overall figure of $227,225,000. That depends in considerable part upon contractual relationship between these two railroads established by a succession of agreements between them or their predecessors in interest (supplemented by various statutes of New York State and Connecticut) commencing in the 1840's. The relative rights and liabilities of these railroads in respect of these non-operating properties (known as the Grand Central Terminal properties) can best be understood by viewing them in historical perspective. This can be done comparatively briefly in regard to the earlier events.

The fee title to the land comprised by the entrance of these railroads into mid-town Manhattan was obtained by Central's predecessor and subsequent subsidiary the New York and Harlem Railroad Company. By agreement made March 17, 1848 between Harlem and a predecessor of New Haven, New Haven acquired "the right to run their trains, engines, and cars for the transpor-

tation of passengers, mails, expresses, freight &c over the track or tracks of the road of [Harlem] from a point of junction aforesaid to and into the city of New York, and as far over the same in the said City as the said Company's road shall extend * * * the said New York and New Haven Company furnishing their own haulage." The duration of the agreement was "during the terms of their charters respectively and for all renewals thereof", with exceptions not presently material, and the rental was to be on a passenger basis subject to change by mutual agreement or, in event of inability to agree, by arbitration. Chapter 143 of the laws of 1848 authorized the New Haven's predecessor to enter upon and run its cars and engines for all purposes over the Harlem's road and "as far into the said City as the said Harlem railroad may extend, upon such terms and to such point as has been and may hereafter be agreed upon by and between said companies * * * ."

This agreement of 1848 was recited in the lease by the Harlem to Central's predecessor dated April 1, 1873 as having granted to New Haven " certain rights upon and to use the tracks and certain of the property and premises" of Harlem and in the supplemental lease of December 31, 1885, it was recited that New Haven had secured by the 1848 agreement "the exclusive use in common with [Harlem and Central] of all tracks of Harlem between Woodlawn junction and Grand Central Depot", "including any and all additional tracks that may hereafter be laid along or upon the railroad of [Harlem] between said points;".

These agreements did not provide for the use of or entrance into the Grand Central Depot as the old railroad station was called, except that by the last mentioned agreement a leasehold interest in the New Haven was created in the Grand Central Depot during the term of the charter of New Haven. These rights were recognized by re-allotment agreements made in 1897 and 1898, and by the Union Station agreement of March 23, 1899, the cost of making certain changes and alterations in the station was apportioned among the companies, rooms were assigned to New Haven for its exclusive use, and New Haven was given the right to sub-

let all or any part of the rooms of which it had exclusive use. These and other provisions, such as that the Central might make changes in plans and specifications or enlargement of the terminal "with the previous approval in writing" of New Haven resulted in an opinion in 1905 by George W. Wickersham concurred in by Henry W. Taft that, among other disputes arising between these railroads, the New Haven was not bound to vacate the then existing Grand Central Depot at the request of Central and Harlem, and that payment for changes and improvements to the Depot had been expressly provided in the supplemental tripartite lease made in 1885.

The rights and obligations of the parties provided for by the tripartite lease and the agreements supplemental thereto respecting the Grand Central Depot were terminated by the key agreement of July 24, 1907, under which the present Grand Central Terminal building was erected. They are of more than minimal importance, however, inasmuch as they express a significant part of the relationship between these railroads at the time when the 1907 agreement was made, and, likewise, for the reason that portions of their substance entered into the 1907 agreement. It is likewise significant that the 1907 instrument stated expressly that nothing contained therein should impair any of the rights of either railroad under the agreement of March 17, 1848 (Par. 26). These pre-1907 contracts show, beyond question, that New Haven did not need and was not dependent upon the 1907 agreement to gain access over the railroad property of the Central to mid-town Manhattan, which was already secured to it for the duration of its charter which was perpetual, that the New Haven could not be ousted from the use of the former railroad station and even that it could not be altered or reconstructed without New Haven's consent and participation. They show that New Haven did not come to the bargaining table in 1907 in the posture of a supplicant. This has its bearing upon the construction of the 1907 and supplemental agreements, which ought not to be interpreted as indicating that the contracting parties intended to subordinate New Haven's rights in these properties to Central to

an extent which would only have been likely to have occurred if New Haven were there merely by sufferance of Central.

Central contends, rightly, that this common operation between itself and New Haven began as a joint enterprise in railroading. Basing the consideration to be paid by New Haven toward paying the fixed charges and operational expenses of the terminal upon a "car-use" formula may well have partaken of the nature of joint facility agreements between railroads (cf. Baltimore & O. R. R. Operation, 261 I.C.C. 535; St. Louis, S. F. & T. Ry. Trackage Rights, 267 I. C. C. 763; Wisconsin Central Ry. Reorganization, 267 I.C.C. 423, 471-72; Chicago, B. & Q. R. R. Trackage Rights, 271 I.C.C. 675). It may also be true that joint facility agreements do not ordinarly create an ownership interest in the railroad which is granted joint usage of trackage or terminal facilities (Thompson v. Mexican Ry. 328 U.S. 134). But joint facility agreements between railroads for trackage rights or joint use of station facilities do not, ordinarily, result in the creation of streets having real estate values which are among the highest in the world. The Grand Central Terminal properties, exclusive of the Terminal building itself, are not connected with the operation of either railroad. They were made possible by compliance with Chapter 425 of the Laws of 1903 and Chapter 69 of the Laws of 1904 enacted by the New York State Legislature requiring these tracks to be put below ground between 42nd and 57th Streets and Madison and Lexington Avenues and railroad operations over them to be electrified. This eventually resulted in converting a smoky railroad ditch, shunned by all who could afford to keep away from it, into one of the most famous and sought after of streets anywhere. It would be ironical if their ownership of these lands and buildings depended entirely upon a mere railroad facility agreement, essentially designed for other purposes. The Interstate Commerce Commission observed, correctly, as it seems to me, that

> "If the agreement is a joint facility agreement, it is most unusual and to label it a 'joint facility agreement' is not helpful in ascertaining the rights of the parties." (331 I.C.C. 683)

It may be helpful, however, to recall the circumstances under which this complex arrangement was begun, and then to trace its metamorphosis as new agreements were piled one upon another and as the parties departed from or adhered to the original pattern under materially changed conditions.

The construction of the Grand Central Terminal and the placing of the railroad tracks underground (together with expanding railroad business) appear to have occasioned the agreement of July 24, 1907. In essentials, it defines the words "Railroad Terminal" as including all of the real property with which we are concerned in this reference. "Railroad Terminal" is defined by paragraph 1 as meaning and including "the land, and interests in land, and all improvements thereon (not including the distributing system hereinafter mentioned), and all rights in any ways on which said land may abut * * *." It provides that Central (in which I include Harlem) leases to New Haven

> "during the term of the New Haven Company's charter and all renewals thereof, including the charter of any company which shall operate the present railroad of the said New Haven Company, the use, in common with the Central Company, subject to all the provisions of this agreement, of the said Railroad Terminal for the accommodation [sic] of the traffic of the New Haven Company, other than freight traffic, provided however, that the New Haven Company's right to the use thereof shall in no event exceed fifty (50) per centum of the maximum capacity of said Railroad Terminal, or any part thereof." (Paragraph 3).

For this, New Haven agreed under paragraph 4 to pay "a proportion" of the following items:

> $485,393.69, per annum, and, in addition, interest reckoned at 4¼ per cent per annum on net expenditures made or to be made
>
> (a) In acquiring land for the Railroad Terminal other than the land included in the said agreements of November 1, 1872, and December 31, 1885;

(b) In constructing said Railroad Terminal;

(c) In repairing, rebuilding or changing any part of the Railroad Terminal made necessary by act of God, fire, civil commotion, violence, casualty or operation of law;

(d) Payments on sums owing by Central to the City of New York on contracts previously made;

(e) In making any other changes in or additions to the Railroad Terminal to which the New Haven Company shall have previously given its assent in writing;

The New Haven Company's proportion of said fixed charges shall in no event be less than $160,179.92 in each year.

In addition to those six items, payable quarterly, New Haven further agreed to pay Central annually a proportion of annual net payments required by the terms of said agreements with the City of New York, and premiums for insurance. By way of further consideration the New Haven was required to pay within 30 days after being billed by Central, its share of all net cost of maintenance, repairs, renewals and operation of the Railroad Terminal, plus court claims.

The agreement further specified in paragraph 4 that:

"The method of determining the proportion of the use of said Railroad Terminal, or of any part thereof, to which each company shall be entitled and the proportions of the aforesaid payments so to be made by the New Haven Company shall be by ascertaining for the month, quarter or year in question the proportion which the use of the Railroad Terminal by the New Haven Company bears to the entire use thereof, use to be based upon the number of cars and locomotives, excepting those performing Railroad Terminal service, entering the said Railroad Terminal."

It is clear that the Grand Central Terminal proper was designed and constructed to provide greater capacity as a railroad terminal than would have been done if it had been intended to serve the requirements of Central alone. When they commenced operating

under the 1907 Agreement, New Haven paid to Central out of its operating revenues its share computed on a car-use basis of the items previously mentioned, comprising proportionate carrying charges on the acquisition of the land in the Railroad Terminal area (supplemented, of course, by the rent paid for land and trackage outside of the Terminal properties area), and the other items required by paragraph 4. In the beginning these items were undoubtedly paid as a railroad operational expense under the terms of this agreement.

Concessions in the Terminal Building were not unknown, however, even then, and it was contemplated that there might be some other Terminal revenue so that, without defining it closely, the parties inserted in their 1907 Agreement a paragraph numbered 14 which has become of pivotal importance in consequence of the development of these non-operating properties. The material portion of paragraph 14 reads as follows:

> "The Terminal Manager shall prepare, or cause to be prepared and certified, proper vouchers for all expenditures or disbursements made by him hereunder, which shall be audited and paid by the Central Company. He shall also prepare or cause to be prepared proper collection bills for all rentals or other compensation due from any person or corporation for the use of or accruing from any part of the said Railroad Terminal, which collection bills shall be audited and collected by the Central Company; and all such rentals or other compensation so received, and not belonging exclusively to either Company, shall be credited to the fixed charges or to the cost of maintenance and operation of the said Railroad Terminal, as the same may be applicable."

Credit items going into this "Terminal Account", as it has been called, were, at first small. The effect of paragraph 14, just quoted, was to apply to the payment of the fixed charges and operational and maintenance expenses of the Terminal, defined in paragraph 4 which have previously been enumerated, whatever revenues were obtained from the Grand Central properties. The shares of both Railroads in those revenues were committed to the

obligations described in paragraph 4. The share of the New Haven was, in a manner of speaking, pledged to pay these obligations, and, likewise, the share of Central. It was apparently not expected that the Terminal revenues would exceed the Terminal Account's obligations and, of course, these revenues relieved New Haven *pro tanto* of its obligation to pay a proportion of these expenses computed on a car-use basis, which according to the experience of the Railroad, has ranged between 40 and 45 per cent. Thus for convenience in accounting, it became customary to ascribe 40 per cent per annum (or whatever the car-use percentage was) of the revenues from the Terminal properties as belonging to New Haven, and to credit New Haven with the same amount and proportion in payment of its Terminal Account obligations. Nothing in any of the agreements stated how much of the Terminal Account revenues belonged to either railroad. The accounts were set up on that basis because of New Haven's obligation to pay its car-use percentage share of the fixed charges and expenses of maintenance and operation of the Terminal under paragraph 4 of the 1907 agreement, and the commitment of Terminal revenues made by paragraph 14 to the payment of these Terminal expenditures. It was not until 1964 and 1965 that the Terminal revenues exceeded the Terminal's expenditures. Then, for the first time, were New Haven and Central confronted with the problem of what to do with the excess. Then, and not before, were they faced with an interpretation of their rights to the surplus under the contract. Central contended that it owned the entire surplus for the reason that it owned the fee title to the land. New Haven (through its Trustees in Bankruptcy) sued Central in lawsuits pending undetermined.

Property values began to improve beginning in the immediate neighborhood of Grand Central Terminal itself. In 1912 Central and New Haven erected the Hotel Biltmore across Vanderbilt Avenue from the Terminal proper on the plot of land bounded by Madison Avenue, 43rd and 44th Streets. Central and New Haven entered into an agreement February 15, 1912 which recited that the cost of construction of said hotel building was to be borne equally by the parties and the agreement so provided. The build-

ing was constructed by a subsidiary, but each railroad company supplied half of the funds which were reimbursed dollar for dollar, in accordance with the agreement, the final repayment being made in 1957. Thereafter, the 1912 agreement provided, the ground rental and additional rentals from the hotel should be credited in accordance with paragraph 14 of the agreement of July 24, 1907 previously discussed. The 1912 Biltmore Agreement provided that structural changes or renovations which might be required to the Hotel would be paid for equally by Central and New Haven. A lawsuit between Central and New Haven concerning their interests in the Hotel Biltmore was commenced in 1960 (New York Central R.R. Co. v. New York, N.H. & H. R.R. 24 Misc 2d 414, affirmed 13 App. 2d 309; affirmed 11 N.Y. 2d 1077.) The point immediately at issue in that action was whether Central could lease the Biltmore to a subsidiary controlled by it, notwithstanding that New Haven objected and requested other arrangements. Central took the position that New Haven had no further interest in the Biltmore Hotel property after its original investment had been repaid under the Biltmore Agreement. It further contended that since New Haven had refused to sign the lease to Central's subsidiary, on being told to do so by Central, New Haven had broken its agreement and forfeited all interest in that real property. The questions involved on this reference to me as Special Master were not all decided by the Biltmore Case, but it bears importantly upon the present subject matter and will be discussed more fully later.

By 1913 it evidently became apparent to these railroad companies that they ought to have something more than the sketchy arrangement which they had previously outlined for what gave signs of becoming a non-operating real estate development of considerable magnitude. They therefore made a "SUPPLEMENTAL AGREEMENT" dated November 13, 1913 which recited the agreement of July 24, 1907, stating that "it is desired to express more fully the intent of the parties hereto as to the right of the New Haven Company and the Central Company with respect to the construction, maintenance and use" of buildings recited as theretofore or thereafter to be constructed by the expendi-

ture of "large sums of money * * * ". They therefore provided in this agreement

"That the parties hereto, in consideration of the premises, and of the mutual promises herein contained, have agreed for themselves, their successors and assigns, with each other as follows:

That the following words shall be added at the end of Paragraph 3 of said agreement of July 24th, 1907, expressing a demise and lease to the New Haven Company with the same effect as if they had formed a part of said agreement at the time of the original execution thereof by the parties hereto, to wit:

'It is understood and agreed that the use of the Railroad Terminal demised by this paragraph to the New Haven Company shall include the right on the part of the New Haven Company to join with the Central Company, in accordance with agreements relating thereto, made, or from time to time to be made, by and between the Central Company and the New Haven Company, in the construction, holding, maintenance and leasing of buildings, or parts thereof (other than such buildings or parts thereof as form a part of the Railroad Terminal to be constructed by the Central Company as hereinafter provided) upon the land included within the Railroad Terminal. In every such building, together with the right of support thereof, toward the construction of which the New Haven Company shall furnish or contribute money, and until it is reimbursed therefor, the New Haven Company shall furnish or contribute money, and until it is reimbursed therefor, the New Haven Company shall [sic] have and own an undivided interest which shall bear the same proportion to the entire building as the amount of money furnished or contributed by the New Haven Company, and for which it has not been reimbursed, bears from time to time to the entire cost of the construction of such building. At the time when the New Haven Company shall be fully reimbursed for all moneys furnished or contributed by it for or toward the con-

struction of any such building, with interest at such rate as shall have been agreed upon, such undivided interest of the New Haven Company shall cease. In all cases in which the New Haven Company and the Central Company shall join in the construction of any such building or buildings, the rentals to be credited to the fixed charges or to the cost of maintenance and operation of the Railroad Terminal under the provisions of Paragraph 14 of this agreement shall include all rentals accruing from the leases of the buildings or parts of buildings so constructed, except such rentals as by agreement between the New Haven Company and the Central Company shall be paid over to the New Haven Company and the Central Company or either of them as a proper return for the moneys advanced by such party to provide for the construction of any said buildings. It is expressly understood and agreed that, to facilitate the raising of money for the construction of such buildings, any rights of the New Haven Company or of the Central Company in such buildings or any of them or any parts thereof and in or to any rentals accruing from the lease of such buildings or any of them or any parts thereof, may be, by agreement between the Central Company and New Haven Company, at any time hereafter, conveyed, assigned or pledged to one or more corporations, associations or trustees.' "

This agreement of 1913 recites that its object is to express more fully the intent of the parties under the agreement of 1907. However that may be, it reflected a relationship between Central and New Haven regarding these non-operating properties which involves considerably more, in substance, than a mere joint facility transportation agreement between two railroads. The right of the New Haven "to join with the Central Company, in accordance with agreements relating thereto, made, or from time to time to be made, by and between the Central Company and the New Haven Company, in the construction, holding, maintenance and leasing of buildings" indicated that what these companies were contemplating was a major real estate development to extend over a period of many years. Central has abandoned the argu-

ment that New Haven had no further interest in these properties after being reimbursed for the building costs. The holding of the Biltmore case and the language of the Biltmore agreement are contrary to that contention. New Haven was there held to be entitled to participate equally in the management of the Hotel Biltmore in 1958, although New Haven had been completely reimbursed by 1957 for the $2,800,000 which it had contributed for the cost of construction. The New York Courts held in that case that although New Haven's specific equal undivided interest with Central in the title to the Biltmore Hotel expired in 1957, New Haven had a further interest in that property which was carved out of Central's fee title to the extent provided by the applicable agreements between the two railroads. It is true that New Haven passenger trains were using Grand Central Terminal when the Biltmore case was decided, as they are today, and that the question was not expressly presented whether the further interest of the New Haven would end if New Haven passenger service into the Terminal were discontinued. That question will be discussed later. It is helpful to its solution as well as to the solution of the other problems presented to review the legal theory of ownership expressed in the opinion of the Appellate Division in *Biltmore*. The New York Court of Appeals unanimously affirmed without opinion. The analysis by the Appellate Division is thus expressed at pages 316-320:

> "New Haven was in the Biltmore project as a matter of right — a right arising out of its interests in the railroad terminal property acquired by the 1907 agreement, for the good and valuable considerations therein set forth. What rights did the 1907 agreement give to New Haven with respect to the 'Railroad Terminal' within the limits of which the Biltmore was built? It should be noted that the words 'Railroad Terminal' are defined to mean the 'land and interests in land' and also 'all improvements thereon'. The 1907 instrument gave to New Haven the use of the railroad terminal 'in common' with the Central Company. '[I]n common' were the words used — not subservient to Central; 'in common' and not with Central as the dominant partner. Im-

plicit in the words 'in common' is that New Haven had the right to the use of the lands 'and all improvements thereon' on equal terms with Central.

"And lest it be urged that such right to the use of the railroad terminal in common with Central be limited to properties underground, we consider the following: the 1907 agreement was written in the light of the legislative mandate that the tracks be covered and yet it gives New Haven the right to use in common with Central not only the land but also 'all improvements thereon'; it was written with the parties knowing of the opinion of George W. Wickersham, who, at the instance of the parties, had defined their rights and established among other things New Haven's depot rights, indicating that railroading requires use of land over as well as under the ground; the practical construction of the parties implicit in their entering into the 1912 construction agreement and jointly agreeing to and signing the necessary documents with their prospective tenant; and lastly, but significantly, the signing of the 1913 agreement which by its terms was made a part of the 1907 agreement. It might be here added that having been made a part of the 1907 agreement, the 1913 agreement should be so read. To do so we must read the word 'joint' together with the expressed intent of the parties that they use the properties in common. Joining in common with Central spells for New Haven an equality of control rather than a position subservient to Central.

"It is apparent, therefore, that the parties did not come to the conference table in 1913 to establish new rights but rather — as stated in the 1913 preamble — to define rights already established and already acted upon. And they came to the conference table on equal terms despite the fact that Central was the owner of the fee. Its ownership had already been encumbered — encumbered by the rights of New Haven to use the terminal land 'in common' with Central. Moreover, whatever advantage Central claims by reason of being the owner of the fee was neutralized by the obligation of

New Haven to pay to Central and Central to receive 4¼% of its actual net expenditures in acquiring the land and for the construction of the railroad terminal. And in consequence, provision was made for a ground rent to be paid, not to Central alone, but for the benefit of New Haven as well, through the medium of the terminal account. Ordinarily the ground rent is paid only to the owner of a fee or one who has an interest in the fee. Incidentally, that ground rent is still being credited to that account to the advantage not only of Central but of New Haven.

"The actual underlying fee of the land upon which this great railroad terminal was laid out is largely a matter of only historic importance, since it is clear that it became dedicated by the fee owner to the railroad passenger terminal usages of both railroads, and all of its structures and facilities were incidental to those usages, or were created to provide income to maintain those usages. No such importance attaches to rights of the party who owns the underlying fee as might be expected in the usual leasing or licensing of land; and what is of greater importance on the intention of both parties, they had already fixed their rights in the terminal area land and in its development as being equal rights before they undertook the construction of the Biltmore or other structures or facilities incidental to the terminal passenger operation. They had, in effect, converted themselves into owners of the fee together, as far as the area of this controversy stretches.

It is clear that the development of the lands over the tracks was but another step in the joint exploitation of the railroad properties made possible by the covering of the tracks. It was an incident in the development of the railroad terminal in which each party had a joint interest — that of Central as owner of the fee and that of New Haven by virtue of its rights which, for good consideration, were carved out of the fee. Nor does the fact that New Haven ceased to have an undivided interest in the structure as such, after its invest-

ment had been returned, alter the conclusion reached. There was then no need for New Haven to have an undivided interest in the building as such. The effect of that provision was merely to merge title to the building with that of the fee. The entire fee, however, still remained and remains encumbered by the rights of New Haven. That those rights, however they may be construed, continued beyond the repayment of New Haven's investment is now conceded by Central. Had they not, Central would not have continued to credit New Haven with its share of the income from the building after the return of its principal and there would have been no point in or necessity for Central having tendered the 1958 lease to New Haven for signature as it did. * * *

"[Central's] position wrongly assumes that when New Haven first exercised its option to join in the 'construction, holding, maintenance and leasing' of the property by paying one half of the cost of construction no definitive rights in the property were acquired by New Haven except the right to join docilely in each of the decisions made by Central. * * *

"Upon argument Central compared the position of New Haven to that of a minority stockholder. The comparison could be considered an accurate one if Central were correct in its contention. But such comparison does not help solve the problem presented because it assumes that New Haven has no right to a voice in the control of the properties — the very question we are called upon to resolve. It must be observed, however, that a minority stockholder is not usually invited or permitted to join in the operation and maintenance of corporate properties — certainly not in common with those in control. I believe that a more accurate description of New Haven's position, if we wish to consider it in corporate terms, would be that of one holding stock in an amount sufficient to give it equality in control. A still better description of New Haven's position would be that of a partner."

It is true that two buildings only of the non-operating properties in the Grand Central Terminal area have been shown to

have been constructed by money furnished directly by New Haven or by Central. These are the Biltmore and Waldorf Astoria Hotels. The Waldorf was completed about 1933. In each instance Central and New Haven furnished half of the money contributed to the construction of the building, $5,000,000 apiece in case of the Waldorf Astoria. Exhibit NH1-87 contains a number of sample agreements under which most of these buildings were erected. Improvements were financed by direct advances of Central and New Haven, as in case of the Biltmore and Waldorf Astoria Hotels, or by guaranteeing the borrowing incurred by a subsidiary for the purpose of construction. Under the latter procedure, the pattern was that if the rentals to the subsidiary were insufficient to support its financing, New Haven and Central each agreed to contribute one-half of the deficiency (cf. 1925 Agreement relating to the construction of the Hotel Barclay (NH1-87 p. C-1) [sic]. In some instances, as in case of the recently constructed Pan American Building, the tenant agreed to erect the building at is own expense. Both railroads benefitted from the ground rents which were computed, also, on the air rights. In fact New Haven as well as Central have continued to benefit to date from the ground rents of parcels of real property in the Grand Central Terminal area even where New Haven did not exercise its right under the 1913 agreement to join in their construction. The uniform practical construction of their contractual relationship has resulted in both railroads benefitting from the ground rents throughout the area. As the Appellate Division stated, ground rents are ordinarily paid to the person or persons having an interest in the ownership of the land.

The conclusion by the Appellate Division in the Biltmore case, in which the judgment was affirmed by the Court of Appeals, that these two railroads became, in effect, partners or joint venturers in the development of the Grand Central Terminal properties needs no single, simple contract to support it. It is true that

> "even if one or two or three like provisions contained in such a contract do not require this conclusion, yet it is also true that when taken together a point may come where stipulations immaterial separately cover so wide a field that we

should hold a partnership exists." (*Martin* v. *Peyton*, 246 N.Y. 213, 223).

Even where there is no partnership writing

> "executed setting in force the agreement of the parties, it must be determined from the testimony, from the conduct of the parties and especially from the documentary evidence" (*Adamson* v. *Adamson*, 249 App. Div. 418, 420), in which a partnership was implied *prima facie* from circumstances.

It is well settled that a contractual relationship may be pieced together out of separate writings, signed and unsigned, even to satisfy the Statute of Frauds (*Crabtree* v. *Elizabeth Arden Sales Corp.* 305 N. Y. 48). But the Statute of Frauds is not involved and need not be considered in this case since it has been held that for "a contract for a partnership or joint venture in lands, no writing was necessary (*Chester* v. *Dickerson*, 54 N. Y . 1; *Mattikow* v. *Sudarsky*, 248 N. Y. 404)." *Weisner* v. *Benenson* (275 App. Div. 324, 325, aff'd. 300 N. Y. 669). A corporation may, in a joint venture with others, transact business which is within the scope of its legitimate powers (*Manacher* v. *Central Coal Co.*, 284 App. Div. 380, aff'd. 308 N. Y. 784; see 60 A.L.R. 2d 917 in relation to the power of a corporation to enter into a partnership or joint venture). A joint venture may exist for a limited purpose and does not necessarily include all of the business or activities of its participants (*Levine* v. *Goldberg*, 2 App. Div. 2d 409).

Many of the characteristics of a joint venture or partnership are present in this enterprise undertaken by these railroads, such as the sharing of profits and losses in the development of these non-operating real properties. It has long been the rule under the case law and expressed in New York State by section 40 of the Partnership Law that "subject to any agreement between them" each partner is entitled to "share equally in the profit and surplus remaining after all liabilities, including those to partners, are satisfied; * * *." (*Carlson, as Administrator* v. *Frank Samuel & Company, Inc.*, 28 Misc. (2) 357, 359). Partners may include in partnership articles, however, practically any agreement they wish (*Riviera Congress Associates* v. *Yanwsky*, 18 N.Y. 2d 540) for

sharing profits and losses, priorities of distribution on winding up of partnership affairs and other matters, in absence of prohibitory provisions of statutes, common law rules, or considerations of public policy, and the agreement so made controls, if complete, as between partners (*Lanier* v. *Bowdoin*, 282 N. Y. 32).

It seems to me to be clear, and to have been decided in the *Biltmore* case, that there was a joint venture or partnership here of some kind. On that theory plaintiff and the intervening bondholders or representatives of bondholders contend that New Haven is entitled to half of the $227,225,000 less the capitalized minimum rent of $160,179.92, under the rule that partners or joint venturers are presumed to have equal interests unless otherwise provided by contract. It is true that equality of interest of Central and New Haven in these non-operating properties was recognized by their contracts in a number of respects. Each company was to be reimbursed, dollar for dollar, for its contributions of money for construction of buildings. Each was required to be responsible equally for deficits where buildings were constructed from moneys borrowed on the credit of the two railroads, if the revenues proved to be insufficient to carry or amortize the loans; each had an equal right in the management of the properties, which could not be sold without the consent of both. These factors, combined with the presumption of equality in joint venture or partnership transactions, have an important bearing upon the so-called "excess income" to be mentioned later. Since equality of interest is, however, subject to whatever qualifications or limitations the parties may impose by contract, I find the bondholders' contention to be untenable that New Haven has a complete undivided interest in the Grand Central Terminal non-operating properties, appraised at $227,225,000 (subject to capitalization of the minimum rental).

The 1913 agreement and all of the supplemental agreements provided expressly in the same language or in substance what is stated in the agreement of 1913:

"In all cases in which the New Haven Company and the Central Company shall join in the construction of any such

building or buildings, the rentals to be credited to the fixed charges or to the cost of maintenance and operation of the Railroad Terminal under the provisions of Paragraph 14 of this agreement shall include all rentals accruing from the leases of the buildings or parts of buildings so constructed, except such rentals as by agreement between the New Haven Company and the Central Company shall be paid over to the New Haven Company and the Central Company or either of them as a proper return for the moneys advanced by such party to provide for the construction of any said buildings."

This can mean nothing else but that New Haven and Central agreed that after the buildings erected or to be erected on these lands had been paid for out of earnings, so that the railroads had been reimbursed for moneys advanced by them respectively, or relieved from liability for guaranteeing the loans incurred for their construction, all further revenue from the non-operating properties as well as from concessions in the Terminal Building proper should go into the so-called "Terminal Account" provided for by paragraph 14 of the Agreement of 1907. That paragraph commits these revenues to be applied upon the obligation of both railroads to pay the fixed charges and expenses of maintenance and operation of the Terminal more particularly defined in paragraph 4. The fixed charges, it should be remembered, include 4¼% annually on the cost of acquisition of the entire Grand Central Terminal properties. That was the rate of interest which the parties evidently contemplated would represent a fair average interest rate throughout the years. It did not differ greatly from the interest rates carried by the bonds of the railroads, and was evidently designed to represent the carrying charge on these capital expenditures. To the extent that it was payable by New Haven, it was evidently designed to represent New Haven's share in the capital cost of the land, the construction of the Terminal building and various other items pertaining thereto. There can be no question that by mutual agreement these revenues from all of the Grand Central Terminal properties were pooled to apply on the fixed charges and maintenance and operational costs of the Terminal.

Since, independent of any "Terminal Account", New Haven and Central were obligated to defray these expenses in proportion to a car-use formula, the amount payable by each railroad was reduced by what went into the Terminal Account under paragraph 14. It meant, for practical purposes, that if New Haven's car use was 40% of the total car use by both railroads, then New Haven would benefit from the Terminal Account to the extent of 40% of the revenue which went into it and, *pari passu*, its independent obligation to pay fixed charges and maintenance and operational expense was reduced by the same amount. That resulted, for accounting purposes, in the corresponding proportion of the revenue entering the Terminal Account being treated as the property of each railroad, and in each railroad's being relieved *pro tanto* from the amount of its liability to meet the charges mentioned.

It is quite evident that when these agreements were made the possibility of discontinuance of passenger trains into the Terminal was not explicitly envisioned, nor was the contingency that the revenue entering the Terminal Account under paragraph 14 would exceed the amount of the fixed charges and maintenance and operational expenses of the Terminal. For so long as New Haven and Central passenger trains used the Terminal in ratio of approximately 40 to 60, and the Terminal Account revenues were less than the demands upon it for the purposes stated, the questions referred to me as Special Master did not arise.

Now that passenger trains on the New Haven, at least, have become a continuing deficit operation, and the non-operating real estate property values and revenue have exceeded original expectations, divergent conclusions have been drawn concerning what the parties intended but did not specifically express. The car-use clause (which had its origin in the pattern of railway joint facility agreements, which pattern has been long outgrown here with respect to the non-operating properties on Park and Vanderbilt Avenues and 42nd St.), so Central argues, signifies that if New Haven passenger trains cease to enter the Terminal then and in that event all right, title or interest of New Haven in these hotel

and office buildings would disappear. Upon the other hand, it is contended by or on behalf of New Haven bondholders that since the two railroads are joint venturers or partners with respect to these real estate operations, subject only to paragraph 14 of the 1907 Agreement, if New Haven stopped using the Terminal, then, because of the car-use formula, New Haven would no longer be under any independent obligation to contribute to the payment of the fixed charges or expenses of operation or maintenance of the Terminal, and that it would, therefore, be absolved from the requirement that the revenues from these properties be paid into the Terminal Account. Central counters by arguing that since the agreements require all of the revenue to be paid into the Terminal Account, New Haven would have no further interest therein if its passenger traffic were discontinued inasmuch as its sole interest in the moneys entering the Terminal Account was geared to and depended upon its car-use of the Terminal.

Both of these contentions seem to me to be incorrect. Central, as has been said, never needed and would not have built a railroad station of the size of Grand Central had it not been that New Haven was to share the use and expense of the terminal. Both parties, as has been seen, committed themselves to pouring these revenues from the entire Grand Central complex into the Terminal Account under paragraph 14 of the Agreement of 1907. The revenues were to enter that account and were to be expended, superior to the individual interests of each railroad, by being applied on payment of the fixed charges and expenses of operation and maintenance of the Terminal. Those revenues were pledged to that purpose regardless of whether New Haven utilized one per cent or fifty per cent of the Terminal's passenger facilities, or whether it used any of those facilities at all. It was not contemplated that if either railroad discontinued passenger trains into Grand Central the other would be saddled with the entire expense of a terminal larger than either railroad needed without being credited with these entire revenues from the Grand Central Terminal properties to the extent that they were required to meet expenditures described in paragraph 14 and more specifically enumerated in paragraph 4.

Neither was it intended, as Central contends, that if these revenues exceeded the requirements for fixed charges, maintenance and operation the excess should belong entirely to Central. A variety of arguments is arrayed in support of that conclusion which are, to my mind, completely unconvincing. In the first place, these agreements, read together, are more than a joint facility agreement, a conception which the Interstate Commerce Commission remarked "is not helpful in ascertaining the rights of the parties." (331 ICC p. 683). The car-use formula was certainly not intended to deprive New Haven of all the equity interest which a joint venturer or partner would normally have in a real estate development for which it contributed millions of dollars of capital and subjected itself to millions of dollars of potential liability. Central's position is that New Haven was supplying capital and incurring heavy obligations on the basis that if it proved to be a losing venture, New Haven would suffer along with Central, but that if it proved to be lucrative (as it did beyond expectations) then Central would reap the entire profit except as New Haven might benefit by a reduction in or the absorption of its obligation to contribute to the payment of fixed charges and terminal maintenance and operation under paragraph 4. Central makes this extravagant contention notwithstanding that the fixed charges were based, in part, on cost of acquiring land for the non-operating properties. It should be borne in mind that under the construction which clearly should, as I think, be placed upon these agreements, the fixed charges upon land acquisition cost as well as the operational and maintenance expenses of the Terminal will continue to be paid out of the revenues entering the Terminal Account (even if New Haven passenger traffic were to be discontinued) in priority to the computation of any equity interest in the New Haven. That is all that Central is entitled to have, as I see it, under any view of the facts or the law, and regardless of whether any New Haven passenger trains go into or out of the Terminal. The comment of Special Term in the Biltmore case on the intention of the parties is relevant (24 Misc. 2d at p. 425):

> "Is it reasonable to believe that sound, practical, hardheaded railroad executives representing New Haven some 50 years ago would have agreed to a business proposition resulting in its joint financing with Central of 18 buildings in the Grand Central Terminal area, whereby it would commit itself to such large and expensive investments, assuming 50% of the risk of loss and no share of profits, only the return of its investments with interest, while Central, sharing the risk of loss, would take the entire profit? The court would be naive to assume that the present heads of these railroads possess greater business acumen than did their predecessors of half a century ago."

The 1907 and 1913 Agreements, like the other contracts entered into between these parties before and afterwards, contemplated a business relationship extending over long periods of time. It was not in the front of the minds of the parties in those years either that New Haven passenger traffic would fall on such hard times or that the real estate development of the Grand Central Terminal properties would prove to be such a bonanza. Park Avenue today is different from the smoky railroad ditch it was at the turn of the century. These contracts do not expressly state what shall happen in event of the discontinuance of passenger trains by either railroad or in event of an excess in the Terminal Account over terminal expenditures. It is necessary to interpret these agreements as it sometimes is in case of a statute where contingencies have occurred that were not clearly envisioned in the beginning. The following apt statement is contained in 17 A, C.J.S. 284:

> "In the absence of an express provision therefor, the law will imply an agreement between the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made."

Here, as it seems to me, these contracts are "instinct with an obligation imperfectly expressed" (*Wood* v. *Duff-Gordon*, 222 N. Y. 88, 91, Cardozo J.) that these revenues shall be expended unconditionally to meet the total expenses stated in paragraphs 4 and

14 of the Agreement of 1907, which is impressed as a charge upon the equal partnership or joint venture found by the Appellate Division to exist in the Biltmore case, but that after these charges have been met from these revenues, the excess belongs equally to each railroad. In my view this right of the New Haven would not and could not be terminated by the mere discontinuance of passenger service into and out of the Terminal. It may be noted that the Interstate Commerce Commission said:

> "It is reasonable to conclude that NH would not have embarked on such real estate ventures unless it anticipated that it would enjoy the benefits thereof regardless of whether its rail operations continued" citing the Biltmore case (331 ICC pp. 682-683).

The car-use formula (according to which an average ratio is assumed in the neighborhood of 40% to 60%) has nothing to do with the distribution of the excess in the Terminal Account. The 1907 Agreement, and the other agreements, show that it was established at most to fix the amount of New Haven's and Central's relative obligations with respect to the payment of the fixed charges and maintenance and operational costs not defrayed by the Terminal Account. There could not be an excess in the Terminal Account unless those charges were fully met. Once they have been met, the car-use formula, in my opinion, loses all significance insofar as the rights and liabilities to the excess are concerned. I regard the rationale of the Biltmore case, adopted in holding that there was equality of control, to have established an equal partnership or joint venture in these properties except as modified or restricted by other provisions in the agreements. That is, I think, the rational construction to be placed upon it and it is the construction which has been adopted by the New York State courts. The car-use formula, as has just been pointed out, has no function after the Terminal Account charges have been entirely satisfied.

Neither is Central's contention sound that it is entitled to the entire excess in the Terminal Account for the reason that it owns the fee title to the land. No one disputes that it owns the fee but,

as the Appellate Division said in *Biltmore*, its ownership of the fee is subject to the rights of New Haven which are carved out of it by the contracts. As has been previously shown, and as is emphasized in the Appellate Divisions' opinion in *Biltmore*, it is not uncommon for joint ventures or partnerships to be entered into, frequently by corporations, in real property, where the legal title is in one but the rights of the parties between themselves depend upon the joint venture arrangements.

The case of *I.C.C.* v. *New York, N.H.&H.R.R.*, 287 U.S. 179 simply held that the interest of New Haven in these non-operating properties was not a type of property which could be used as part of the base for rate making purposes, or, at least, that this was not so clear as to be enforceable by mandamus. Although the Interstate Commerce Commission was a party to that lawsuit, the Commission did not regard it as controlling here since it held that this claim of New Haven to an interest in the Grand Central Terminal properties is one "of substance" and "must be deemed to be valuable" (331 I.C.C. p. 684).

The Commission pointed out that not until 1964 and 1965 was there excess income in the Terminal Account and, computing New Haven's portion thereof at 40%, found the excess was $1,842,401 in 1964 and $1,473,627 in 1965 or an average for the years of $1,658,014.* The Commission capitalized this (annual) average excess income at 8%, and arrived at a figure of $20,000,000.

---

*Central contends that these amounts should be reduced by $292,743 in 1964 and $493,368 in 1965 on account of payments for furniture, furnishings and equipment for the Hotel Barclay. Since these were non-recurring items and no attempt was made to amortize them over their useful life, it would be inaccurate and misleading to deduct them in full from these two measuring or test years. If those items were paid in a particular year they would not have to be paid in the next. If this plan is approved, the interest of New Haven in the Terminal Properties is forever gone. It is the revenue potential which furnishes the standard, not how the rents were handled by accountants in any one or two years. The record is somewhat deficient in evidence of rental value, and how it is affected (in detail) by the existing leases upon the properties.

But since Central denied (without basis) that New Haven has any interest in these properties and conceded only a nuisance value of $5,000,000, the Commission averaged that amount with the $20,000,000 which resulted in a figure of approximately $13,000,000 (331 I.C.C. 684). It is said that the Commission divided by two on account of the hazards of litigation. But, although the Commission considered that New Haven's rights in the properties would not terminate upon the discontinuance of its passenger service into the station, and that "it is unreasonable and unfair to conclude that the New Haven would enter into agreements for development of terminal properties with obligations equal to those of Central but with rights to benefits inferior to those of Central," nevertheless the Commission did not weigh the merits of New Haven's claim or appraise its prospects of success in litigation but treated any lawsuit as a lottery and evaluated the claim as though it depended upon the flip of a coin — not even a throw of the dice, since a throw of dice involves more than two possible results. That in itself is enough, as it seems to me, to indicate that this valuation by the Commission was arbitrary and capricious and lacked substantial evidence to support it.

In making that valuation, I think that the Commission fell into several serious errors. I think it greatly under-estimated New Haven's prospect of success in the New York courts on its claim to share in the excess in the Terminal Account regardless of discontinuance of its passenger service into Grand Central Terminal. Second, as has been shown, the car-use ratio under the 1907 agreement has no function except to allocate to New Haven and Central their respective proportions of the burden of paying the fixed charges and expenses of operation and maintenance of the terminal under paragraph 4. Once those charges are paid, as they necessarily will be paid in full from the Terminal Account whenever it has a surplus, then the car-use formula serves no further purpose unless in some other situation if there is any to which it is expressly made applicable. After payment of the terminal expenses, the overflow from the Terminal Account reverts to the equal joint venture which has been found to exist in the Biltmore case regarding these non-operating properties. Therefore, the ex-

cess income from the Terminal Account should legally be divided on an equal basis between these two railroad corporations. Third, the 8% capitalization rate utilized in capitalizing the excess income impresses me as too high based on the testimony of Mr. Donald Macdonald [sic] and other evidence in the record. This will be mentioned again in a moment. Fourth, potential increases in the revenues from the Grand Central Terminal properties, which are a factor in the present value of New Haven's claim, have not been adequately considered. This is illustrated, in one instance, by the complete disallowanee in the appraisal of any income from the valuable air rights above the Grand Central Terminal building, which, in themselves, are alleged to be worth $3,000,000 per annum. Even if that figure be exaggerated, these air rights could result in a substantial increase in the annual return. A high rental is paid for the air rights of the adjoining Pan Am building. There may be opposition to utilizing these air rights of an administrative or governmental nature, but it would seem that the prospect of their having rental value is promising and that their potential value might well be further explored.

The reason why these income factors were not further explored may possibly have been that the more aggressive controversy focused upon whether New Haven was entitled to half of the total appraised value of these properties amounting to approximately $110,000,000. Before taking further evidence regarding the leases and the rental values of these properties, however, I would prefer to have additional authorization or direction from the Reorganization Court in the light of this report, which can be treated as a final report or as an interim report as to the Court may seem advisable.

On the basis of present evidence in the record, it appears from Mr. Macdonald's appraisal (Exhibit NH1-19) [sic] dated April 19, 1965, that the non-operating properties throw off an income of nearly $14,000,000 to which may be added an income from the Terminal building of about $4,000,000. If the expenses payable from the Terminal Account run about $13,000,000, as it is said that they do, that would produce about $5,000,000 excess income to be divided equally between the two railroads. Five per cent

is the figure used by Mr. Macdonald for the ground rents and rental from most of the office buildings, and if that figure were used in capitalizing New Haven's share in the rentals it would greatly augment the value of New Haven's interest. It is true that although the land value "encumbered" by existing leases was appraised by Mr. Macdonald at $166,925,000 and the building value at $60,000,000, about 60% of the income is derived from hotels, including the ground rent for hotel properties. It is because of the uncertain nature of hotels that Mr. Macdonald applied a 10% capitalization figure to their building value and the Commission an 8% overall figure in capitalizing the rental from all the land and buildings.* The difficulty with either the 8% or 10% figure is that the shortened life of hotels in this area of midtown Manhattan results mainly from the circumstance that the lands on which they are erected have become too valuable for hotel purposes. That is hardly detrimental to the owners of the land or of the rental to be derived from the land. This does not seem to me to be the usual situation involving hotel depletion. It is not based mainly on depreciaton or obsolescence. In the case of the Pan Am Building, for illustration, neither railroad paid for or financed the building which was construced [sic] by the tenant on a long term lease at high ground rental in which both railroads share. So, in case of a hotel property converted into an office building in this area, the tenant is likely to put up the building and pay enough for the use of the land to justify the operation and the change from hotel use. Hotels have been demolished to use the land for high office buildings which bring in larger returns to the owners of the land. Both Central and New Haven have to consent to the demolition, sale or rental of any of these properties, and it would appear that if any of them are to be demolished it would be for the reason that higher rents could be obtained if the

---

*Exhibit NH1-30A [sic] does not substantiate the contention that the World's Fair was mainly responsible for the excess income of the Terminal Account in 1964 and 1965. The hotel income averaged about the same for the decade 1956-1965 but the office building rent doubled. The office building rent increased by 65% in the last three years of the decade.

nature of the use were changed. That fact raises important questions about whether the relatively ephemeral nature of hotels would, in this location, be financially detrimental and it bears importantly on what would be the correct interest rate for capitalization purposes. One could have wished that the record were more complete and illuminating in this respect. The assertion on behalf of Central that the Park Avenue area has reached its zenith and may be on the decline does not seem to square with the facts. The New Haven trustees originally proposed that these non-operating properties be excluded from the merger and that the respective right, title or interest of each of the two railroads be decided in the State Courts, but Central flatly refused to accept New Haven in the merger unless it got absolute title to all of this valuable real estate, and would listen to no further words upon the subject. But the acquisition of absolute title to the properties was listed as an important item in the Central's proxy notice to its stockholders for approval of the merger.

An overall rate of 8% is too high. Taking Mr. Macdonald's testimony all together and relating his values to his income, the average rate that he indicates is 6%, including the hotel income and other income. It would greatly increase the value of New Haven's interest if its 50% share in the excess income, amounting to nearly $2,500,000,* were capitalized at 6% instead of 8%.

---

*Exhibit NH1-18 [sic] indicates an annual excess of $1,900,000 on a 40% basis for New Haven. If this were increased to 50% it would be just under two and one-half million dollars. The supplemental complaint of the Trustees in their action against Central to recover for 1966 is too incomplete to have any probative force. It needs to be supplemented by other evidence. Although the $1,900,000 figure is described in Exhibit NH1-18 [sic] as an "optimistic estimate", it is not clear that in includes ground rent from buildings that were not listed by Mr. MacDonald [sic] in arriving at his $227,225,000 which was paid into the Terminal Account in instances where the New Haven did not "join" in construction of the building, such as Nos. 230 and 320 Park Avenue and 466 Lexington Avenue (cf. NH1-30 [sic], table 7, testimony pp. 230, 86-89). Moreover, it does not appear adequately to allow for the upward trend of Park Avenue business property.

If this were not just one factor in this important railroad merger and reorganization — though an important item — in determining whether a plan is fair and equitable, I would recommend that further evidence be taken in regard to these phases of valuing the New Haven's interest in the Grand Central Terminal properties. Time is, of course, an important object. I am, therefore, submitting to the Reorganization Court whether additional evidence should be produced and received.

This report concurs in a number of respects with the opinion of Sullivan & Cromwell rendered to the Trustees in Bankruptcy of New Haven July 16, 1964. It also differs from some of the conclusions expressed in that letter. In comparing the two, it should be noted that no valuation of $13,000,000 is placed upon the Grand Central Terminal properties by Sullivan & Cromwell. That figure was reached, according to the method previously described, solely by the Interstate Commerce Commission. This report agrees with that opinion that the revenue from the Terminal properties must go into the Terminal Account under paragraph 14 of the Agreement of 1907 in priority to any distribution to New Haven or Central in order to defray the Terminal expenditures more particularly described in paragraph 4, in instances where the building construction costs had been repaid out of revenue. At the time of the Sullivan & Cromwell letter there had been no years in which the Terminal Account revenue had exceeded the Terminal expenditures. The letter does discuss what would happen in case of a credit balance in the Terminal Account due to favorable developments in the real estate venture. It concluded that the underlying fee in Central is largely a matter of only historic importance, that the Biltmore decision refutes any contention that the entire excess would belong to Central and that the two railroads are partners in the development of the Terminal area. There is also agreement that Central could not legally sell any of the Terminal properties without the concurrence of New Haven, whose consent would be required in the disposition of the proceeds of any such sale. There is agreement that the "demise" to the New Haven by the 1907 Agreement includes in its term not only the term of New Haven's charter but also "the charter of any

company which shall operate the present railroad of the said New Haven Company" and that New Haven, therefore, can have a successor company which would take its rights. It is also agreed that reorganization of the company itself presents no problem in that respect. It is true, as stated in the Sullivan & Cromwell opinion, that under paragraph 6 of the 1907 Agreement New Haven agrees not to assign or underlet without the consent of Central, but the same is true the other way around and, for valuation purposes, it must be assumed that Central and New Haven would unite in order to obtain the maximum price in the event of sale, rental or other disposition of any of these properties. This report differs from the conclusions in the Sullivan & Cromwell letter in that it is reported here that excesses in the Terminal Account are distributable equally between the railroads instead of upon a car-use ratio, and in concluding that discontinuance of passenger traffic into the Terminal would not terminate the 1907 Agreement and the 1913 Agreement even though New Haven had been reimbursed for all building advances. The Sullivan & Cromwell letter is guarded in its expression of the conclusion that these agreements would be terminated by cessation of passenger traffic. It is said there that it can fairly be argued that the 1913 Agreement, although cast in the form of a mere addition of words to paragraph 3 of the 1907 Agreement, established a new business relationship which was not of a railroad character or necessarily governed in all respects by the provisions of the 1907 Agreement relating to the railroad relationship between the parties. To this is added, in reference to the 1907 and 1913 Agreements: "We do not purport to carry this opinion further than the Agreements mentioned, however, or consider now the effect of a discontinuance of entrances upon other agreements between the railroads." Although I do not agree that the 1907 and 1913 Agreements would be thus construed, I base my conclusion upon all of the agreements between these railroads and not upon the Agreements of 1907 and 1913 alone.

In concluding this report it may be appropriate to say a few words about the subject of my jurisdiction which is derived, of course, from the order of April 8, 1968 of the United States Dis-

trict Court for the District of Connecticut (the Reorganization Court) which is the source of my authority. It has been argued by Penn-Central and the Interstate Commerce Commission that the powers vested in me by that order exceed those of the U. S. District Court in this Reorganization proceeding, and that as Special Master I cannot exercise any powers which do not reside in the court of my appointment. It would appear that I should not go behind the order of reference of April 8, 1968, and that any grievance of that nature should be tested by appeal from that order. It is presumed that the intent of the order is not to confer any powers in excess of those possessed by the Reorganization Court. Since the extent of these powers has been argued by counsel, this question of jurisdiction will be discussed briefly.

It is contended by Central and the Commission that although Section 77 (e) of the Bankruptcy Act (11 U.S.C. §205), confers power upon the U. S. District Court to determine whether a reorganization plan is "fair and equitable", subdivision (e) grants exclusive jurisdiction to the Commission to determine and certify values of property to the Court which are asserted to be binding on the Court in determining what is fair and equitable. Only if a certification of value is arbitrary or capricious, or lacks support by substantial evidence, so this argument runs, is the Reorganization Court empowered to use its own judgment in the evaluation of items of property disposed of by a reorganization plan in the case of a railroad. This argument is carried to the extent of assertion that valuation evidence is not even admissible in the Reorganization Court.

If the Waldorf-Astoria or the Pan American Building did not belong to railroads but were involved in a reorganization of an ordinary business corporation, no one would, of course, contend that they had to be valued by the Interstate Commerce Commission or that a Reorganization Court could not rule upon their values in determining whether a reorganization plan was fair and equitable. *In re Western Pacific R. R.* (34 Fed. Supp. 493, 501, rev'd. 124 Fed. 2d 136, rev'd. 318 U. S. 448) and *Ecker* v. *Western Pacific R. R.* (318 U. S. 448, 472) are cited in support of the

view that the jurisdiction of the Commission is exclusive, *Old Colony Bondholders* v. *N.Y., N.H. & H.R.R.* (161 Fed. 2d 413, 420, cert. den. 331 U. S. 858) to the effect that even in appraising non-operating properties in railroad reorganizations the determination by the Commission is final even when it depends upon questions of law. No cases are cited in the *Old Colony* case in support of the latter proposition.

In the first place, it seems to me that the determination by the Commission of the value of these Grand Central Terminal non-operating properties is arbitrary and capricious and that it has been made without substantial evidence in its support. Attention has been drawn to the circumstance that the Commission arbitrarily divided by two its capitalized estimates of the value of New Haven's interest in excess revenues in the Terminal Account, without any adequate appraisal of the likelihood of success in the New York State courts in establishing even that much as a basis for New Haven's interest in these properties. It took a figure ($25,000,000) which resulted from the division of the estimated surplus revenue as between these two railroads (using the car-use formula instead of an equal division), capitalized at a percentage which was manifestly too high and reached the figure which was halved by averaging this erroneously computed amount with the nominal figure of $5,000,000 which was the nuisance value assigned by Central to New Haven's interest in these properties. Certainly the amount which Central presented as nuisance value had no relation to the prospects of success of New Haven in establishing its rights in the surplus in the New York State courts. The result, reached by this method, was necessarily arbitrary and capricious since the method adopted in computing it was unrelated to any correct method of procedure.

It is likewise my view that Central and the Commission would constrict too narrowly the power of a Reorganization Court even in a railroad reorganization proceeding. This particular railroad reorganization is or must be, in certain respects, *sui generis*. The passenger railroad operations of the New Haven have, after many prosperous years, turned out to be a dismal failure economically.

Upon the other hand, the Grand Central Terminal non-operating properties have been a spectacular success. The Interstate Commerce Commission, as was clearly evident from the argument of its counsel on this reference before me as Special Master, found no constitutional barrier to the property rights of New Haven in these non-operating properties becoming exhausted by continued deficit operation. It was even stated that the railroad would have to operate permanently at heavy losses without recourse by the bondholders unless the Commission granted a certificate of abandonment, regardless of how much the non-operating properties might be depleted in providing transportation for the public at the bondholders' expense. This was not the purport of the decision by the Reorganization Court in denying the motion for termination of reorganization proceedings February 13, 1968, nor of the decisions cited therein. It shows, however, that the manner in which the Commission conceives its duty to the public conflicts with its duty justly to protect the private property rights of the bondholders. This conflict is all the more pronounced in a situation like the present where the assets of the railroad, including the non-operating properties, are taken from the bondholders, as their ultimate owners, irrespective of their consent. Technically speaking, this is not a condemnation proceeding but, in a number of respects, it is analogous thereto. Before any price was set or vote taken of bondholders or any security holders, the Commission withheld its consent to the Penn-Central merger unless New Haven were included. The price and terms were left to subsequent fixation. Undoubtedly the Trustees in Bankruptcy and, very possibly, some of the bondholders, may have considered that the property interests of New Haven would best be served by merger with Central, but only the Trustees agreed upon the price and terms, they did so with Penn-Central in a strong bargaining position in order to gain Penn-Central's consent, and the bondholders have been told, in effect, by the Commission in approving the plan, that they must accede to the terms stated in the Purchase Agreement. Since the Penn-Central merger has already been accomplished, and subject to the requirement that New Haven be included, this amounts in reality (whether or not it does

in name) to a taking of the property of the bondholders without their consent. This is not a proceeding in the Court of Claims but the Constitution binds the Reorganization Court as well and that means that private property cannot be taken for a public use (railroads are affected with a public interest and empowered to condemn for that reason) without payment of just compensation. I doubt that this constitutional requirement is met by leaving the determination of questions of value entirely to the Commission, particularly under circumstances where it is confronted with a deep conflict of interest between its functions in discharging this duty. Under such circumstances it has been said by a learned authority that it may be appropriate to impose greater burdens of proof and more thorough going judicial review (Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914, 919-920).

In "A Note on Administrative Adjudication", 74 Yale L.J. 652, Commissioner Elman of the FTC pointed out the dangers and potential aberrations in administrative adjudication where the Commission's own report makes it clear that policy factors have so dominated the Commission that an impartial adjudication by the evidence by it is seriously inhibited. A concurring opinion by Justice William J. Brennan, then a New Jersey Superior Court Judge, in *In re Larsen* (17 N.J. Super. 546, 86 A. 2d 430) as suggested that a court, when reviewing an administrative determination that strongly reflects an agency's combination of functions, should enlarge its scope of review beyond the usual substantial evidence rule. In its inclusion report of the New Haven, the Commission said in this case that its "efforts necessarily must be directed towards assuring the continuation of NH's railroad services" (p. 80). The protection of the property rights of the bondholders is left mainly to the Court.

The powers of review of findings of value by the Interstate Commerce Commission may well be broader, under these circumstances, than would otherwise be the rule. In addition to that, and whatever the scope of review of the Commission may be, it seems to me that a Reorganization Court in determining whether

a plan is fair and equitable, even in a railroad reorganization, is vested with a considerable amount of original jurisdiction. It is hardly appropriate for me at this point to attempt to delimit that jurisdiction by any inclusive definition, but it is enough to say that the matters entrusted to me on which to report as Special Masted [sic] appear to fall well within the limits of such jurisdiction.

Dated: June 17, 1968.

Respectfully submitted,
JOHN VAN VOORHIS
Special Master

Supplemental Report of Special Master

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

SUPPLEMENTAL REPORT OF SPECIAL MASTER RESPECTING DEBTOR'S RIGHT, TITLE OR INTEREST IN THE GRAND CENTRAL TERMINAL PROPERTIES

(Appearances omitted in printing)

This report, as authorized June 25, 1968 at New Haven, by the United States District Court for the District of Connecticut, Honorable Robert P. Anderson, United States Circuit Judge, sitting by designation, supplements the report previously submitted by me as Special Master under date of June 17, 1968. It was there report that in my opinion (except for the final reimbursement to New Haven of its advances toward the construction of the Waldorf-Astoria hotel to be made in 1968) whatever right, title or interest the New Haven has in the so-called Grand Central Terminal properties is to be measured by the capacity of the Grand Central Terminal Account (established by paragraph 14 of the Agreement of July 24, 1907 between Central and New Haven) to throw off surplus revenue. The general aspects of this formula

for evaluating the New Haven's interest were approved — although not correctly applied — by the Interstate Commerce Commission in its report and order of November 16, 1967 (331 ICC 643). The Three-Judge Statutory District Court for the Southern District of New York, in reviewing the said order of I.C.C., in an opinion by Judge Friendly, concurred in by Judge Weinfeld in this respect, concluded that New Haven's claims to share in surplus income in the Terminal Account over and above all terminal expenses, even though New Haven ceased to operate in and out of the Grand Central Terminal, are exceedingly strong. The Court also concluded that New Haven's share of the surplus income is determinable on a 50% basis and not by the proportion of car-use (The New York, New Haven and Hartford Railroad Company, First Mortgage 4% Bondholders Committee, et al. against United States of America and Interstate Commerce Commission, et al., decided July 10, 1968).

In my first report it was pointed out that the factors entering into a reliable determination of the value of the interest of New Haven under this formula were inadequately covered by the evidence received by the Interstate Commerce Commission or presented to me at the earlier hearings conducted on May 2nd, 7th and 8th, 1968, on which my report was based. This inadequacy did not relate, in my view, to anything connected with arriving at the formula to be applied for the ascertainment of New Haven's interest, but, rather, to the application of the formula in order to determine a reasonably accurate dollar value of this interest in the Terminal properties. I did not place any figure upon that but, on the basis of the evidence then before me, reached a number of conclusions on the basis of which it seemed to me, as it did to the unanimous Three Judge District Court, that the allowance by I.C.C. to the New Haven on account of its interest in the Grand Central Terminal properties had been substantially underestimated. In reporting on the application of the factors entering into an evaluation of New Haven's rights, on the basis of that evidence, I noted that it was incomplete in some respects and said (p. 39):

"If this were not just one factor in this important railroad merger and reorganization — though an important item — in determining whether a plan is fair and equitable, I would recommend that further evidence be taken in regard to these phases of valuing the New Haven's interest in the Grand Central Terminal properties. Time is, of course, an important object. I am, therefore, submiting to the Reorganization Court whether additional evidence should be produced and received."

A hearing was held by Judge Anderson, as previously stated, in New Haven on June 25, 1968 on whether further evidence of this nature should be directed to be taken, at which Judge Anderson stated *inter alia:*

"The first portion of the hearing will be devoted to the advisability and necessity of a supplemental hearing, which is, in effect, a continuation of a former hearing held before Judge Van Voorhis, on which he has already filed a report, and the question is whether, in the light of the report that the Special Master has already made, in which he specifically suggested the advisability of holding such a hearing, which he did not do at the time because of the urgency of getting in the report on the main issue, that is, having to do with the nature of the legal interests, if any, that the New Haven had in the Grand Central properties.

"We are now concerned, as he pointed out, with the laying of some kind of a foundation or rounding out the record with a kind of analysis of the existing leases and a prognosis of rental values, as that might have a bearing on the value, the purpose being to show the potential of the properties or the lack of it. It would be the potential of developing the land there, and also the necessity of showing the possible expenses, all looking toward determination of the probability of any surplus over and above the terminal fund and what prognosis would be made of the size of any such excess if it seemed apparent that there would be one."

After hearing counsel for the Bondholders, who spoke in favor of such a hearing and for Penn-Central in opposition thereto, the Court made certain statements and directions from which I quote the following which relate directly to this inquiry and define the scope of this supplemental report:

"I don't think it is contemplated at least by the court, anyway, that the Special Master is to determine dollar value. That is a function of the Commission.

"What the Special Master has already done, which is step one or part one, is to determine there are certain legal interests in the Grand Central properties and the New Haven and has described them.

"Now, the Special Master, of course, will report to the Court. The Court is not going to tell the ICC what it must find precisely in dollars of valuation. But the issue regarding the Grand Central properties is an extremely important one as far as this reorganization is concerned.

"The element of time is extremely important, and it would seem to me helpful and useful in the long run that the Special Master explore, in addition to the abstract legal interests involved, whether there exists any evidence of such, whether there is a fruitful area for exploration here, and to explore the terrain and report it back to the Court.

"The ultimate dealing with that will rest, of course, in the hands of the ICC, and whether they want to hear all the testimony over again and what they want to do is up to them. * * *

"So here we are interested in whether we are talking pure abstraction or whether there is evidence existing which would justify prognosis of surplus or excess income over the terminal fund which would give return or body or practical meaning to the rights that existed.

"The final step of saying what that value is, is not to be determined by the Special Master or by this Court, but it certainly is of interest in reviewing the reorganization plan

that has been certified to this Court to discover the nature of the interests the New Haven has and whether or not the circumstances that exist call for the weighing and fact finding and conclusion of its value of any such interests.

"But the actual determination of that value, as I said before, and I repeat, is not something that the Special Master is going to report. Factors that go into it, the basic ingredients, that he will deal with. * * *

"We feel what Mr. Perkins has stated — and he undoubtedly has in his brief — as to factors that have to be considered here, items of expense, nature of the income and prognosis of the future expenses which must be taken into consideration, are useful and will be helpful to the Special Master and the Court. * * *

"In talking about offers of proof and whatnot, I didn't mean by that, that it would be putting down and submitting lists of what you have.

"The Special Master, of course, has more than that [to do] because he has to be satisfied that it is evidence, that it is being offered. He has to hear something to some extent, and I had hoped that perhaps by this discussion we had that it would perhaps tend to narrow the scope a little bit, at least, in what you have in mind that you don't have to put in perhaps as full proof as if you were before a trial court trying a case where judgments would be entered, because I am not going to make a finding on it, in the sense of the ICC would be making. But the purpose for which I want it is to determine whether in exploring the terrain, as I have said, there is something there, and it would seem to me to be helpful to me, and the ICC, if the general scope and nature of this report, and enough, by the way, of the evidence, would be presented so that the Special Master would have a chance to pass upon it and weigh it to a certain extent * * * and I think he certainly would be able to separate the wheat from the chaff, and what his reaction is to it and his opinion on it is something that I value and would like to have.

"So to some extent, evidence has got to go in, but as far as exhaustive cross examination back and forth and that kind of thing, I think much of that should be shortened. * * * I do have to have a certain qualitative treatment from the Special Master on it."

Pursuant to this outline of the scope of my duties and as a continuation of the previous hearings before me as Special Master under the order of April 8, 1968, which called upon me to make a legal appraisal of the interests and rights of the debtor in said properties and to take any additional admissible evidence that bears upon New Haven's rights therein and to take whatever action is necessary and proper to a determination of the aforesaid matter, I conducted a further hearing at the U. S. Court House in Foley Square, New York, N. Y., commencing July 8, 1968, pursuant to notice duly given to all interested parties to the proceeding. I continued to sit as Special Master until the evidence and argument submitted by the parties had been concluded, which occurred during the afternoon of July 13th. The decision of the Three-Judge District Court vacating portions of the I.C.C.'s orders of November 16, 1967 and March 1, 1968 became the subject of a motion by Penn-Central at the opening of the fourth day of these hearings on July 11, 1968, to suspend these proceedings. The contention was made that neither the Reorganization Court nor the Special Master has jurisdiction in view of the remand by the Three-Judge District Court to I. C. C. This contention was overruled in the following memorandum (p. 1243):

"In the first place, I am directed to proceed as Special Master under an order, the terms of which are broad, in relation to these Grand Central Terminal properties.

"The lines of demarcation between the jurisdiction of the Commission and the jurisdiction of the Reorganization Court are not as clearly defined as perhaps they might be, but it is clear enough that the Reorganization Court has power and is charged with the duty of resolving in many respects this railroad bankruptcy.

"It is also clear that the matter of valuation of the Grand Central Terminal properties is, of necessity, an integral part of the determination of fairness and equitableness of any reorganization plan and it would seem to me that unless and until there is a revocation or modification of the order of Judge Anderson under which I am acting I should proceed to a conclusion of this matter which is now here pending."

Counsel for the Trustees of New Haven took the position that the plan which had been approved by I. C. C. had not been withdrawn and that "Penn-Central having stated that it still might appeal the decision of the three-judge court, we would agree that if your Honor so determines to go forward we certainly would not oppose that."

Having stated its position, Penn-Central thereafter continued to offer evidence until the conclusion of the hearings on July 13th.

The record now contains the testimony and exhibits produced by the parties and contained or described in the five additional volumes of the stenographic record.

The highlights of this evidence are briefly summarized in this supplemental report, which attempts to reconcile in part, at least, the seemingly conflicting books and other evidence. It also supplements, in certain respects, the analysis of the Grand Central Terminal Account contained in the opinion by Judge Friendly and in my first report, both of which are based, necessarily, mainly on the record before the I. C. C.

Since, if the formula for valuation recommended in my first report is to be followed, it is necessary to appraise the whole of New Haven's right, title and interest in the entire Grand Central properties by the present value of the right to receive 50 per cent of the surplus revenues of the Terminal Account, * it is

---

*The "Terminal Account" to which I refer is the one defined in paragraph 14 of the 1907 agreement between the railroads; it does not correspond in all respects with the so-called "Terminal Account" as kept by Central and reflected in Exhibit PC 1.

essential to determine the probable income and expenses attributable to that account during the foreseeable future. The income is derived from rental of office buildings (mainly ground rents), from the operation of four hotels (Commodore, Biltmore, Roosevelt and Barclay) from the rental of one hotel under lease to outsiders (Waldorf-Astoria) and from lease or license agreements in the Terminal building of stores, advertising space, concessions, sales of steam and electricity, train privileges and the like. The expenses consist chiefly of interest on capital expenditures (for land acquisition and building expense), operating expenses of the Terminal proper, taxes and small amounts for subsurface rents and vault rentals. The bondholders have tended to maximize the income prospects over the coming years, and to minimize the probable expenses. Penn-Central, upon the other hand, has tried to minimize projected revenue and maximize expenses.

The hearings of July 8-13 concerned themselves with exploring the sources and amounts of income and the probable expenses of the entire Terminal Account, and with ascertaining what would be a suitable capitalization rate by which to multiply the probable long term surplus revenue of the account. The evidence of the amount of the surplus consisted chiefly of exhibits excerpted from the books of New Haven and Central relating to the Terminal Account, annual reports of the Terminal Account and of the hotels included in it together with the testimony of accountants and others under whose supervision these records were kept. Forecasts, also, were prepared and presented by hotel and real estate experts and testimony given by some of the non-operating personnel of both railroads.

The most comprehensive exhibits supplied are PC 1 offered by Penn-Central purporting to show an over-all picture of the Terminal Account for the years 1960-1967, and NHI 30A Extended presented by New Haven purporting to show the Grand Central Terminal Operations and Income From Park Avenue Properties as carried on New Haven's books for the years 1956-1967. Likewise NHI 49, which is the starting point of footnote 12 in Judge

Friendly's opinion, and which, in turn, has its source in the "Total Net Income" line of NHI 30A, and NHI 49 Extended (purporting to place NHI 49 on a 50 per cent figure basis) were testified to have been taken from the books of the New Haven.

During the trial it developed (prompted, perhaps, by the circumstance that the annual reports of the hotels were kept on an accrual basis and the annual Terminal Account reports on a cash basis, as well as the difference in treating capital expenditures for the hotels) that there were four different sets of books relating to the Terminal Account and all of them were kept differently. These four sets of books are inclusive of the records and reports of the hotels or other individual properties. These consisted of (1) books and annual reports of the Terminal Account, kept by Central (2) books and reports of Central's entire business, reflecting its interest in the Terminal Account as part of its property and over-all operations (3) books and reports of New Haven's entire business, reflecting its interest in the Terminal Account as part of its property and over-all operations and (4) books and reports of the hotels and other individual properties comprising the GCT properties .The hotel reports show the annual income of the hotel after deduction for repairs and maintenance but without deduction for capital expenditures which are shown as a liability at the end of the year on the balance sheet. The annual reports of the hotels are on an accrual basis, including the Waldorf-Astoria which, unlike the other hotels, is not run by the railroads but is under lease to outsiders.

The Terminal Account is kept on a cash basis, and income from the hotels is shown after deduction for capital expenditures paid or incurred for the particular hotel during the calendar year. This practice is of long standing. The deduction of capital expenditures annually, in addition to expenditures for repairs and maintenance, was evidently designed to be in lieu of setting up reserves for depreciation and obsolescence. It seems to have been contemplated that these expenditures would, in the long run, approximately offset the ravages of time. If that assumption is correct (as it may well be) it is still necessary to average these expenditures over a

representative period of time if the experience of the years 1964 to date (and any projection into the future) is to be used for the purpose of measuring the present value of the right to share in the surplus income of the Terminal Account. It is also necessary to adjust where more than normal expenditures have been made or are attributable to the measuring years in order to compensate for previous neglect or to remodel or perform other extraordinary work in reasonable anticipation of attracting business during an ascertainable future period.

The Internal Revenue Service did not see it that way, however. Neither, apparently, did ICC in approving the accounts of the railroads. These governmental agencies appear to have considered that money spent for replacements, improvements or additions (capital expenditures) represented an addition to the capital assets of the corporation and did more than merely offset depreciation and obsolescence. Accordingly, these expenditures were entered on the books both of Central and New Haven as additions to capital. Central depreciated its share of these items at 10 per cent per year. New Haven resorted to the alternate so-called retirement method of accounting, whereby the original estimated cost of any replaced capital item was written off instead of taking straight line depreciation. Both the depreciation method pursued by Central and the retirement method adopted by New Haven appear to have been acceptable to IRS and ICC. Counsel for both sides and their witnesses on the subject seemingly regard these two methods as roughly equivalent to each other as they were held to be in Commissioner of Internal Revenue v. Union Pac. R. Co. 188 Fed. 2d 950. In the case cited the Internal Revenue Service sought to require an adjustment with respect to depreciation in the case of a railroad which had been using the retirement method. The opinion, per L. Hand, J., noted that "'Retirement Accounting' was generally approved system of railroads long before they had any motive to reduce taxes. 'Straight Line Depreciation' — the alternative — does not itself conform literally to the truth, since it presupposes without any warrant in fact that all the items of 'ways and structures' depreciate equally every year."

The books of Central, as distinct from its cash record of the Terminal Account, were not offered in evidence nor were sheets abstracted from them. These would have shown the additions to capital in the hotel accounts which neither IRS nor ICC allowed to be written off in one year, and would have shown them depreciated over a period of ten years. Upon the other hand, extracts from the books of New Haven were offered and received in evidence (e. g. NHI 49 and NHI 49 Extended; NHI 30A and NHI 30A Extended) and these were used by ICC in its Second Supplemental Report of November 16, 1967 (331 I. C. C. 643, 684) and by The Three-Judge District Court in its decision reviewing the Commission of July 10, 1968 (Opinion by Friendly, J. f. 12, p. vi). I see no reason on account of which the New Haven's figures (based on the retirement method) should not continue to be used, supplemented by the other evidence in this record, as a basis for evaluating New Haven's right, title and interest in its share in the surplus revenue of the Terminal Account.

It should be noted that if the expenditures of these hotels for capital purposes were written off entirely, each year as they were spent, the $1,960,000 that was spent on capital improvements in 1967, for example, is $666,000 more than the average for the 5 years 1963-1967 and $790,000 more than the average for 10 years 1958-1967. It is true that the Commodore was allowed to run down during part of this period while it was under lease to outsiders prior to the middle of 1967, with the consequence that these 5 and 10 year averages should be increased somewhat, but, by the same token, not all of the extraordinary expense for capital improvements to the Commodore would otherwise have been necessary that was made during the latter half of 1967, and the extra large expenditures projected in the 10 year program of rehabilitation should be taken into account in evaluating the projections of income over the next 5 years which will be discussed later. It needs to be borne in mind that this is not an accounting action, that the questions relating to this Terminal Account do not concern (except as to liability of Central to New Haven for New Haven's unpaid share in the surplus for the years 1964 to date) the liability of one railroad to the other but

rather what is the normal amount of surplus to be expected over the foreseeable future using the experiences of this year and past years. Where, for example, there is a change from the accrual basis — as in the case of the hotel accounts — to a cash basis — in the case of the Terminal Account — the question which chiefly confronts us is not whether the Terminal Account eventually gets everything that should go into it but whether, due, for instance, to the payment of nothing into it by the Hotel Commodore during the last half of 1967, the Terminal Account in its report of income becomes distorted as an index of what is to be expected in ensuing years. The Terminal Account, even though it may be kept correctly in the sense that one railroad may not be misappropriating the property of the other, is not necessarily the last word when it comes to determining the present potentialty of the Grand Central Terminal properties to throw off surplus income as a measure of value of New Haven's interest. For that purpose it is more accurate to take the books of New Haven (roughly equivalent, one may assume to those of Central which were not offered in evidence) which is what was done both by ICC and The Three-Judge District Court as has been previously noted. This involves discarding part but not all of the capital assets of the hotels which were purchased by monies spent for purposes labelled capital expenditure.

The rest of this report is devoted mainly to the supplementary evidence presented to me respecting changes in conditions during the years 1966, 1967 and part of 1968, including some discussion of the interest capitalization rate. There will also be some discussion of the summary entitled "TERMINAL ACCOUNT 1960-1967" known as PC 1 submitted by Penn-Central for the first time which has not previously been before ICC or the Reorganization Court.

The most important development since April 19, 1965, which was the date of the appraisals of the GCT properties by Mr. Macdonald in evidence before ICC as exhibit marked NHI 19, has been the lease agreement between a Penn-Central subsidiary and a corporation known as UGP Properties, Inc. of the air rights

above the Grand Central Terminal building for the construction of a proposed fifty-five story office building planned (according to a press release mentioned by Penn-Central's counsel) to have 1.9 million square feet of office space. The lease agreement is in evidence, marked BH 1, A, B, C, and provides for the payment of 1 million dollars annual rent for four years and thereafter at a $1.10 per square foot of net rentable space, exclusive of ground floor space, which may from time to time exist in the new building plus $400,000 per annum all payable monthly in advance. The term of the lease is 50 years. The tenant agrees to pay the taxes and an additional percentage rent of 5 per cent of gross income which, plus the flat rent, is guaranteed to be not less than 3 million dollars per year commencing not later than four years after the commencement date of the lease. It was conceded that the plans for this proposed building, designed to float" over the Terminal building, comply with the existing regulations of the City Planning Commission and the zoning regulations. This lease was, to be sure, delivered to the tenant subject to a letter providing that if the tenant has used its best efforts "to obtain a certificate of appropriateness or notice to proceed from the Landmarks Preservation Commission* and has failed after appropriate order of the Supreme Court of the State of New York and provided, further, that there exists an outstanding designation by the Landmarks Preservation Commission of Grand Central Terminal as a landmark, Tenant and said Sublandlord shall have the right to rescind Lease and Sublease, respectively, by giving to Landlord ten days' written notice of such intention", and in exerting its "best efforts" the tenant is required to file an application with the Landmarks Preservation Commission prior to August 1, 1968 and to bring an action or proceeding through counsel approved by the landlord against any adverse ruling by the Landmarks Preservation Commission. The landlord is given the right to rescind the lease if the tenant has not obtained this result by January 1, 1970, and upon any re-

*Pursuant to Chapter 8-A of the N. Y. City Administrative Code §§205-1.0 through 207-21.0

scision [sic] of the lease the tenant is required to assign to the landlord its interest in any action or proceeding pending in the New York Courts relating to the application of the Landmarks Preservation Commission or relating to the designation of Grand Central Terminal as a landmark or pertaining to any rights or entities under the statute pursuant to which Grand Central Terminal is designated a landlord. In event of adverse decision the landlord is authorized to appeal and the tenant is required to cooperate with the landlord in all matters pertaining to any such action or proceeding. When asked at the hearings whether Penn-Central had abandoned this project, the answer was unqualifiedly "No". Counsel for Penn-Central informed the Court on May 8, 1968, in the earlier hearings that an Article 78 proceeding has been commenced by Central to contest the designation of Grand Central Station as a landmark, and that this suit includes a test of the constitutionality of the Landmarks Preservation Act which is subdivision 25-a of the General City Law providing that cities are empowered.

> "To provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, which may include appropriate and reasonable control of the use or appearance of the neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation which may include the limitation or remission of taxes."

The New York City Landmarks Preservation Commission is constituted pursuant to sections 205-207 of the New York City Charter constituting Chapter 8-A added by local law No. 46, April 19, 1965. The constitutionality, in certain situations, of the Landmarks Preservation Act was upheld at special term in Manhattan Club v. Landmarks Preservation Commission, 51

Misc. 2d 566 and but [sic] not in Trustees of Sailors Snug Harbor v. The Landmarks Preservation Commission 53 Misc. 2d 933.* A landlord has been held to be entitled to test the constitutionality as applied to his property by action for a declaratory judgment (Lutheran Church in America v. New York, 27 App. Div. 2d 237). The same statute was obliquely involved in Keystone Associates v. Moerdler 19 N. Y. 2d 78, (although there it was a different statute which was held to be unconstitutional), wherein an injunction was denied to restrain the demolition of the old Metropolitan Opera House. The Court said: "It is not necessary, at this time, to enter into a discussion of the Landmarks Preservation Law or any other statute which appears to have been enacted in the exercise of the police power."

If this new project is accomplished, it appears likely to add at least $2,300,000 to the annual income of the Terminal Account. The parties stipulated that the facts stated at pages 600-05 of the transcript of the hearing held before me on May 8, 1968 are correct, and it was indicated at page 601 that the rent for these air rights would be in part offset by the displacement of some stores and concessions in the Terminal building now bringing in approximately $700,000 per year. This apparently refers to stores on 42nd Street and some concessions in the waiting room entrance and on the south wall of the main rotunda of the station.

There is, of course, a precedent for this structure in the Pan-American Building located about 200 feet to the north. Whether the opposition to its construction will succeed is not presently know, but it would seem to me, that the probabilities are in its favor. The Grand Central Station is not proposed to be removed. It is doubtful that the City could insist upon its being maintained at Penn Central's expense as a memorial to the golden age of railroading. The building, as it is, is expensive to maintain, and

---

*"The regulation imposes so disproportionate a burden upon the landowner that it must be set aside in this case as an unlawful taking of property without just compensation [citing cases]": Last paragraph of opinion.

even under the broad scope of the police power in modern times it is doubtful that it can be so constricted without there being a taking without payment of just compensation as required by the state and federal constitutions. This is particularly true in view of the similarity and close proximity to the Pan-Am Building which, it might be argued, could constitute discrimination denying the equal protection of the law. If, under a reorganization plan, all right, title and interest of New Haven in the GCT properties is to be transferred to Penn-Central, a large potential increase in the surplus revenue to be computed of the Terminal Account should result from these valuable air rights. The fairest way might be to insert a provision in the reorganization plan and purchase agreement which would require substantially more to be paid for New Haven's rights if a building is erected above the Grand Central Station.

Other adjustments are suggested by the new evidence mainly respecting occurrences since 1965. Mr. Macdonald who, it will be recalled, was the only real estate witness previously called, and testified before the ICC examiner that he did not "have the vaguest idea" how to go about computing the value of the New Haven's claim on the basis of excess of income over expenses in the so-called Terminal Account under section 14 of the 1907 agreement, resumed the witness stand after having given considerable further thought to this question. In reviewing the income from the properties enumerated in his previous NHI 19, he noted increases in the percentage rents of the Pan-Am Building of $61,916 in 1966 and $92,006 in 1967. He noted that the Vanderbilt Avenue extension parcel had come into $80,000 under the lease instead of $14,165. The Park Lane property is bringing in rentals on a percentage basis of $126,000 more than previously, and more than $200,000 more in flat rent due to an escalation clause taking effect September 30, 1968. The ground leases which had not been included in NHI 19 are bringing in $345,767 from 230 Park Avenue and $14,078 from 320 Park Avenue. The Chatham parking lot (connected with the Vanderbilt Avenue extension) has come into a small increase.

On the other side of the ledger it is contended that the rents from 277 Park Avenue have dropped from $926,355 as shown on NHI 19 to $835,000. I find no such figure as $926,355 on exhibit NHI 19, and the correct figure appears to be as shown thereon $846,500. I find no warrant for the contention that the rent from 52 Vanderbilt Avenue has dropped from $171,137 as shown on NHI 19 to $50,000. The latter figure, to be sure, is what was credited to the Terminal Account by Central's auditor. This property is not under lease but is operated directly by the owners. NHI 19 indicates an income of $171,137 comprised of $80,000 return on the land and the balance of $91,137 attributable to the building. It was intimated that this building was erected entirely at Central's expense. Assuming this to be true, the ground rent was recognized as belonging to the Terminal Account and Central's auditor should not have determined the figure to be $50,000 in view of the real estate opinion evidence that it was $80,000. The NHI 19 figure should, however, be reduced to that amount by $91,137.

The other alleged increases of the GCT account relate mainly to the hotels. The Waldorf-Astoria figures less in this part of the controversy for the reason that it is under lease to a responsible tenant until 1977 with two renewal terms of 21 years each.

The other hotels (Commodore, Biltmore, Roosevelt and Barclay) are operated by a subsidiary of Central known as Realty. They have already been discussed somewhat in this report. There is not a great deal of difference in most of the facts, in so far as they have been proved, but there is a great deal of controversy about the inferences to be drawn from them. The two most contested aspects arise in regard to how to treat capital expenditures for these hotels, and about whether the "Terminal Account" as kept by Central distorts the picture in particular years (as an index of value of New Haven's interest) by disregarding accruals of income in the calendar year and confining itself to cash actually paid over during the year. An example of such distortion arises (in case of the Terminal Account books as kept by Central), as has been pointed out, in case of the Hotel Commodore during

the latter half of 1967 when its income was all spent on capital improvements or for other purposes of the hotel without anything being transferred to the Terminal Account. The subject of deduction for capital expenditures has already been discussed and, on this, I would accept the books of the New Haven kept on a "retirement" basis as have the ICC and The Three-Judge District Court. I mention the subject now in connection with cash accruals. The "Terminal Account" deals, I believe, with the Biltmore on an accrual basis (as well as the Waldorf-Astoria where all that has to be accrued is the rent) but the Terminal Account carries the Barclay, Commodore and Roosevelt on a cash basis whereas their accounts are kept on an accrual basis. This should not make any difference in the course of years since what is not paid (but accrued) in one year is likely to be offset by payments of cash in other years. The evidence does not show what this condition was for other years than 1967, but I think that for that year the Bondholders are correct in contending that an amount just short of $800,000 was accrued but not paid over in cash in 1967 by the Barclay, Commodore and Roosevelt. This does not signify that Central misappropriated this money from New Haven, but it does to that extent distort the surplus earnings figure to the disadvantage of New Haven for the year 1967 as a measuring year.

The other increases claimed by the Bondholders consist in their forecast of increases over the next 5 years which are anticipated by them in hotel net income offset, to some degree, by the approximately $2,300,000 projected for capital expenditures (which, in turn, may be subject to some adjustment on account of the 10 year projected capital improvement plan in the case of the Commodore.) Rather than extend unduly this report by summarizing the bases for these projections I would refer to the survey made by Horwath & Horwath (exhibit BH 2; exhibit BH 13) and the testimony of the Bondholders' witnesses who prepared it or supported it (Jack E. Foulds and Joseph H. Nolin.) Introduced along with these exhibits is a study by Harris, Kerr, Foster & Company entitled "Trends in the Hotel-Motel Business

1967" marked BH exhibit 3. These analyses, which speak for themselves, are mostly prepared from comparative data respecting one hundred leading hotels in the United States ten of which are located in New York City. They show such items as comparative rates of occupancy, gross and net income per room, maintenance and capital expenditures on a room basis and so on. Mr. Macdonald expressed the opinion that the values of these hotel properties had appreciated 20 per cent since he prepared NHI 19 as of April 19, 1965 showing their total appraised values, along with the other properties, to be the $227,225,000. These four hotels represent, of course, an equity investment by Central and New Haven and their capital value as well as their income may be expected to increase or diminish with general business conditions. They now bring in good returns, more than would probably be earned at the present time by ground rents in case the hotels were demolished and office buildings substituted for them. That has been the trend, however, and the evidence convinces me that this valuable alternative has its worth as a viable substitute which may be resorted to in some future years. The evidence indicates that except for the Commodore these hotels have been well kept up, and that a rehabilitation program is being planned for the Commodore and that the hotels may be expected to maintain their competitive positions for a good many years.

Naturally the prospects for these hotels are not entirely rosy nor are they in any other type of business. By far the greater proportion of the testimony was introduced by Penn-Central and their witnesses John D. Murphy, Supervisor of Hotel Accounting; Samuel H. Hellebrand [sic], Vice President of Penn-Central in Charge of Industrial Development and Real Estate; Daniel A. Brener, and John R. White, expert real estate appraisers, as well as their more strictly financial witnesses all testified to the difficulties and problems of the hotel business. They alluded to competition with motels and hotels at airports and elsewhere on the outskirts of the city, the advent of the jet airplanes on an increasing scale whereby many businessmen no longer need to spend the night in New York City but return to Chicago and other

cities on the day of their arrival, increasing wages and other costs, low room occupancy during long weekends, competition from more modern hotels such as the New York Hilton, the Americana, Regency and others. They pointed to the fact that there are about fifteen hundred fewer rooms in hotels in New York City than in 1946, and painted a gloomy picture. None of them would say, however, that these hotels do not have a future or that they are doomed to liquidation. The effort to show marked decreases in room occupancy was successful in so far as comparisions were made with the period at and after the second World War, but few adverse changes in this important index were shown in recent years. In fact the room occupancy has increased in 1968 over what it was in the corresponding part of 1967. There is no reason to believe, I think, that in a period of inflation the revenue from room rents will not more than keep pace with the expenses that are required to be met. In fact the argument that the office buildings are limited in their returns below what the traffic would otherwise bear (a condition considerably alleviated by percentage rents and escalation clauses) does not apply to this hotel business or other equity business interests. Even the Waldorf-Astoria, which is under long-term lease, brings in a rental which is half comprised by percentage rents. It is reasonable to expect that the earnings trend of these properties will be upward.

The remaining source of income and expense is, of course, the Grand Central Terminal proper. In spite of all of the pages of testimony and the exhibits, little exact information was furnished respecting the operations of the Terminal, at least in so far as its revenue is concerned. Exhibit PC 1, submitted by Penn-Central, shows the total terminal expenses to have followed a generally descending course from $18,064,560 in 1960 to $13,644,281 in 1967. About $2,000,000 of this reduction occurred in 1962, and from then on, due to the repeal of the Special Franchise Tax and the reduction in the New York City real estate taxes as a result of the enactment by the New York State Legislature of L. 1959, c. 636, and L. 1961, c. 199 (now con-

tained in §489-a seq. of the Real Property Tax Law). The operating expenses of the Terminal descended from $11,522,926 in 1960 to $9,549,934 in 1967. The Assistant Vice-President for Budgets and Controls testified that about two-thirds of these operating expenses represented labor costs, that about $900,000 of the decrease was associated with a reduction in station employees, $400,000 with a reduction in the maintenance of way expense (the largest single item being station maintenance) and that $800,000 of the decrease was associated with decreases in the cost of producing power sold. He testified that there had been an increase of approximately 30 per cent (roughly 3¾% per year) in wage rates between 1960 and 1968 plus about .5% in fringe benefits, and prophesied increases in total wage rates of about 5% annually for the next five years of which he said he thought they could "eat" about one-half. What he meant was that he thought that the decreases in total wage costs, which have been prevalent in the railroad industry, through greater mechanization and other economies in operation had not come to an end but were slowing up and that, because of increase in wage rates, an increase in total labor costs at the Terminal could be expected of something in excess of $180,000 a year for the next five years. He testified that somewhere between 30 and 40 employees are involved. Presently there are about 460 trains going in and out of GCT daily of which about 90% are suburban. Central has about 9 non-suburban trains in and out each day, of which only 3 are the old long distance passenger trains. The balance are concerned with the new so-called Empire service. New Haven has a few more long distance trains but not many. The Terminal labor involved in servicing trains has been greatly reduced with the decrease in the number of long distance trains which require more attention within the Terminal area than commuter trains in such matters as providing food and liquor for dining and club cars, Pullman service and the like. The expenses of operation of the station would, of course, be further considerably reduced if New Haven trains were discontinued and the hypothesis that [sic] they would be in fixing liquidation value. I have not given much weight to that aspect, however, which

is more theoretical than real since it is hardly conceivable that the commuter trains, at least, would stop running. Penn-Central might well route the New Haven long distance trains through the Penn station (which, incidentally, was evidently not a landmark since it has been torn down and has a building going up over what is left of it) and perhaps resort to other economies which would have a bearing on the GCT expenses. Some terminal economies may result from the Penn-Central merger but the record does not enlighten us concerning what they are.

Neither are we enlightened concerning whether increased income of Penn-Central, resulting from the merger, is likely or unlikely to end the passenger property exemption based on earnings under §489ff of the Real Property Tax Law.

In arguing that there will be projected increases in Terminal income of $2,795,250 attributable to New Haven's share of the excess income (double that amount for the Terminal Account income of the whole) the bondholders have assumed that the net income from the Terminal building will remain the same. In citing these claimed figures I make no finding concerning whether these particular amounts are correct or incorrect. I am simply exploring the terrain. In arguing that the expenses of operating and maintaining the Terminal will not increase, the bondholders have seven years of history on their side. It seems reasonable to believe, however, that there may be an end to potential economies, and that there may be some increases in expenses mainly due to labor costs. The testimony of Penn-Central's Assistant Vice-President in Charge of Budgets and Controls (James J. McTernan, Jr.), which seemed factual as far as it went, tended to indicate that these increases would be likely to be kept within reasonable bounds. The Exhibits BH 7 a, b, c, d, — Central's Reports of Grand Central Terminal's Operations 1963-1967 — show the type of operation going to make up these expenses indicates a fairly even trend.

Something should be said at this point regarding capitalization rates in evaluating the capital value of New Haven's interest in the surplus income of the Terminal Account. More will be said

about this later. In considering the income and expenses of the Terminal, especially in the light of the financial experts as to suitable capitalization rates, the testimony of Penn-Central's experts should be borne in mind that since it is the *surplus* or *excess* income of the Terminal Account which furnishes the measuring standard, the least reliable source of income should govern what interest rate is to be applied. The Terminal expenses are, under my first report, regarded as a charge upon the Terminal income before any excess or surplus can arise. That means that even though the return from the office buildings and hotels may be relatively secure, with increases presently and in the future, the surplus of earnings in the Terminal Account would be adversely affected to the extent that Terminal income from the station itself were to drop substantially. This would be true if the income from the Terminal proper were as unstable as Penn-Central's witnesses sought to indicate provided that the decline were enough materially to impair the surplus. The entire terminal area operation bears resemblances to other diversified businesses where the income is derived from different sources. An examination of the reports of Grand Central Terminal operations which have been mentioned (Exs. BH 7, a, b, c, d) show broad classifications of income sources of the Terminal building. Considering the year 1967, as a sample, page 4 shows the total building revenue to have been $4,160,760.03. This is comprised of what appear to be four rather substantial and solid items aggregating $2,311,373.23 representing what is described as "Station, Train & Boat Privilege" "Electric Current" "Steam" "Refrigeration & Compressed Air." These payments are evidently made entirely or largely by the railroads themselves or their hotels. Some of these utility sales may have been made to other buildings in relatively small amounts but, even assuming that, these sources of income would appear to be reliable. The "Red Cap Collections", the precariousness of which was emphasized repeatedly by Penn-Central's witnesses, only amounted to $86,485.90. The remaining item of income of the Terminal building, (except for $63,159.76 labeled "Miscellaneous") is $1,699,741.14 which is described as "Rents". This includes the stores on 42nd

Street, restaurants, advertising contracts, newstands [sic] and the like. No complete itemization of this source of income has been shown. In fact most of the witnesses for Penn-Central could not remember the amounts paid by the New York Telephone Company for the extensive use of the station for public telephones, the amounts paid for locker rents, nor any of the other constituent items except the $225,000 per year paid by Eastman Kodak Company for its display advertising in the station lobby. Even this was testified to be highly speculative and of little value by a partner in the investment banking firm of Morgan Stanley & Company (which advised both Penn and Central on their merger) for the reason that, although he could not remember how long this display advertising had been there, the Kodak agreement contained a 60 day cancellation clause. This witness testified that he was not an advertising man and had no idea what this prominent display space would be reasonably worth to rent. One would naturally think that the value of this space as a producer of income would hardly depend on whether there was a cancellation clause in this 10 year agreement. The added number of people passing through the lobby of the Grand Central Station as a result of the increase in office buildings in the area and the potential increase in the number of commuter trains, which, it has been argued, may add something to the operating expense of the station, would not be likely to render these station leases or concessions less valuable. If the proposed new building is constructed above the Terminal it will eliminate in all probability about $700,000 annual worth of these tenants or licensees, but this would be much more than offset (as has been previously discussed) by the increased rental to the Terminal Account from these air rights.

It is an established principle of law that all evidence is to be weighed in the light of what is in the power of one party to produce or the other to contradict. The sources of this $1,699,741.14 in rents from the Terminal Building could have been supplied by Penn-Central if they were as volatile as it claims. The total revenue from the Terminal building has remained relatively stable for the 8 years shown on PC 1. In fact the item of rents has not shrunk but has increased by about $150,000 during that period.

The principal decrease in revenue over that time has been due to shrinkage in utility sales which was substantially offset by the decrease in operating expenses due to that item which has been previously mentioned. The financial expert witnesses who questioned the reliability of the Terminal building income, most of whom had participated in some manner in proceedings leading up to the merger, testified that they had talked to employees of Penn-Central but showed on cross eximination that they had practically no knowledge of what the sources of the Terminal building were or how much was attributable to each source.

In summation, the bondholders' counsel began with the exhibit known as PC 1, being a summary of the Terminal Accounts as kept annually by Central for the years 1960 through 1967. Due to the shortage of time and the circumstance that more evidence has been introduced regarding the year 1967 than any other year or years since 1965, the year 1967 seems to have been adopted by the bondholders as illustrative if not completely representative of the Terminal income. It seems preferable to me, at this stage in the litigation, to start with the New Haven's books which were all there was to go on until PC 1 and the Terminal Accounts BH 7, a, b, c, d, were produced at these hearings which commenced July 8, 1968. The principal difference consists in the treatment of capital expenditures and accruals in the case of three of the hotel properties which have been previously mentioned. Penn-Central insists that agreements made by Central with the Trustees in Bankruptcy of New Haven with the approval of the Court (known as PC 3, PC 4, PC 5, PC 6) conclude New Haven from contending that any part of the earnings of the hotels can be considered which went to pay for capital expenditures. The part of these agreements on which Penn-Central relies to reach that conclusion is that which states that the hotels shall pay to Central their net earnings after deducting "all items of accrued capital expenditures" in addition to expenses of "operation and maintenance." These agreements also stated that nothing in them was meant to modify or abrogate the 1907 Grand Central Terminal Agreement, paragraph 14 of which provides

for setting up this account. It seems to me that these agreements provided merely for accounting procedures and that it was not the intention of either the Trustees in Bankruptcy or the Reorganization Court in approving them to transfer to Central any substantive rights which New Haven possessed in the Grand Central Terminal properties. The 1907 Agreement says nothing about whether the Terminal Account shall be kept on a cash or accrual basis, nor how the capital expenditures made by these hotels shall be treated. This is part of what I referred to earlier in this report is calling attention to the circumstance that the "Terminal Account" which is the standard of appraisal of New Haven's capital interest in these properties is the one defined in paragraph 14 of the 1907 Agreement between these Railroads which does not correspond in all respects with the Terminal Accounts as kept by Central.

Several of Penn-Central's witnesses testified to the absence of a market for the Terminal Account and, therefore, the lack of market value. It was pointed out that if there were a market and if the GCT account were sold to an outside purchaser, the Railroads would no longer have an incentive to increase the revenues or hold down the expenses of the Terminal, and could saddle the purchaser with whatever expense they liked by adding to the Terminal operations. Of course neither Railroad could sell its interest without the consent of the other, and it may be assumed, I think, that if they were willing to join together in making a sale of the Terminal Account its nature would be likely to limit or preclude purchasers. Marketability is an advantage, of course, and it may well be that the lack of ready purchasers does, in this instance, have a bearing upon what would be a suitable interest capitalization rate. This does not mean, however, that the courts cannot find the equivalent of a market value as they did under former §1083-a of the New York Civil Practice Act (now carried forward into §1371 of the Real Property Actions and Proceedings Law) where it was held that in the absence of purchasers the market value of property could be determined by its return and a variety of other factors bearing upon its valuation (*Heiman* v. *Bishop*, 272 N. Y. 83).

Supplemental Report of Special Master

On the evidence before me taken at the hearings in May 1968, which consisted almost entirely of the evidence taken by the ICC examiner, there was only the testimony of Mr. Macdonald which related entirely to the proper capitalization rate for a return on land and building value in the case of the GCT properties. It seemed to me, on the basis of his testimony, that the 8% rate applied by ICC was excessive. He testified to a rate of 5% on most of the office buildings and on the land beneath the hotels and a 10% rate upon the building value of the hotels which included, as I recall, 4% for depreciation. The total income amounted to about 6% on his valuation. This did not relate, however, to the Terminal building income nor the Terminal expenses and he made, as previously stated, no attempt to capitalize the surplus (as did the ICC) from the GCT Account. At the present hearings, covered by this supplemental report, he testified that the interest rate on the ground rents had increased to 6% and had gone up on the buildings of the hotels to between 10 and 11%. He did not attempt to place a capitalization rate on the excess income of the Terminal Account. For that purpose the bondholders called an expert witness named Ritter who is professor of finance and chairman of that department at the Graduate School of Business Administration of New York University. He introduced an exhibit marked BH 4, which is a chart showing interest rates 1960-1968 of conventional home mortgages, the prime loan rate of banks, long term government and AAA corporation bonds and the common stock dividend price ratio. He also introduced BH 5 summarizing his theory under which he reached a capitalization rate applicable to the GCT surplus income account of from 4 to 5%. Penn-Central's experts placed it in the range of 10 to 11%. There is, of course, no doubt that interest rates have risen since April 19, 1965, as of which Mr. Macdonald made his appraisal, and he has, himself, raised his own conception of a going ground rent rate by 1%. No one disputes the veracity of Mr. Ritter's charts, but the dispute centers on how to classify the GCT Account. I have no question that Ritter is right in considering that this account has some of the attributes of common stocks due to growth potentialities which may be realized in an infla-

tionary period by reason of the Account's interest in the hotels, in the air space above the Terminal building, in the percentage rents applicable to a number of the office buildings and to the relatively short term leases or licenses of space in the Terminal building. The yield of high quality growth common stocks is now about 3%, and it was pointed out that stocks in some of the hotel chains were selling on that basis. I think that Penn-Central's experts were wrong in excluding growth potential altogether, although I find little in common between the Terminal Account and the Holiday Inn or Hilton Hotel chains. Some weight should, however, be ascribed to the growth potential.

It has been stated that ICC arrived at its 8% capitalization rate on the basis of the testimony of Mr. Macdonald, but the Three-Judge District Court has indicated that its study of the record results in the conclusion that the 8% rate was reached through the exercise of the expertise of the Commission. The opinion states (p. 18):

> "Finally we decline to fault the Commission for its use of an 8% capitalization rate rather than the 5% rate used by the Trustees' expert in estimating the *total* value of the office buildings. The *surplus* income is a marginal item, subject to fluctuation with economic vicissitudes and increased expenses of terminal operation, and a more conservative capitalization rate could thus be deemed in order, especially given the more volatile character of the rentals derived from the hotel properties which the same expert capitalized at 10%. The selection of a capitalization rate, within reasonable limits, is a subject for the expert knowledge of the Commission." (Italics from original).

In the light of the evidence which has been received by me at the hearings convening on July 8th, I find no reason to differ from the correctness of this statement.

According to my instructions from the Reorganization Court, I do not report any particular valuation upon the New Haven's interest in the Terminal properties in dollars and cents. I have

endeavored to anaylyze, to a certain extent, what types of evidence appear to be relevant and available whether introduced into evidence or not. A good deal of background information has been developed regarding the excess income of the Terminal Account for the years 1964 and 1965 which were before the ICC. For the first time Central's annual reports of the keeping of the Terminal Account were produced for those years as well as for 1966 and 1967. More information is in the record for 1967 than for any other year, and the excess income in the account is actually larger for that year than in any of the previous years. Each year needs adjustments if it is to be regarded as a measuring year. The adjustments for 1967 would be mostly upward. The present value of New Haven's 50% interest in the surplus of the Terminal Account depends, likewise, upon its potential for the future, and there are favorable factors making it likely to increase rather than diminish over the years ahead; especially the utilization of the air rights over the Terminal building. It will be affected by general business conditions like every other business. The different sets of books, as kept especially in regard to the hotels, are not really conflicting (one may suppose, although they are not all in evidence) provided that their methods of keeping are understood and suitable adjustments made. It seems preferable to me to begin with the books of New Haven for reasons previously stated. They deal with the capital hotel expenditures and accrued rent problems in a manner apparently acceptable to ICC, and Central's books (using the depreciation method) were not introduced. Central's reports of the Terminal Account, kept on a cash basis and after charging all capital expenditures of the operated hotels to income, are probably accurate and proper for what they show but there is nothing in paragraph 14 of the 1907 Terminal agreement which states that the account shall be carried on a cash basis or that capital expenditures shall annually be charged entirely to income. Whatever books or records are used, it should be remembered that there is no mechanical way by which to evaluate ownership of the right to surplus in the Terminal Account, and that adjustments need to be made in using any of the books and records in order to determine the

meaning of what has already occurred and its existing potential for future growth by intelligent and reasonably conservative forecasting.

As a postscript, it may be noted that the $160,000 minimum payable by New Haven under paragraph 4 of the 1907 Agreement if it discontinued use of the Terminal was to cover or be in lieu of payment of its share in the Terminal expenses. Before there can be a surplus in that account these expenses must all be paid out of the revenue from the Terminal complex. It would be different if the Bondholders' contention were sustained that they are entitled to one-half of the total value of the GCT properties freed from the burden of the Terminal expenses. But if it is held — as it has been thus far and as I think it should be — that the terminal expenses are a charge on the terminal revenues even if New Haven is liquidated, all of the expenses to which the $160,000 minimum relates will have been paid before there can be a surplus. Therefore the $160,000 ought not to be deducted.

The six volumes of testimony taken by me July 8-13, 1968 and the exhibits described therein are submitted herewith.

Dated: July 22, 1968

Respectfully submitted,
JOHN VAN VOORHIS
Special Master

Exhibits Introduced at the Remand Hearings Before the Commission's Examiner, Commencing October 7, 1968

Exhibit R-1

Prepared Testimony of Richard Joyce Smith, a Witness for the New Haven Trustees

* * * * *

—3—

It is clear that the immediate question to be faced is the conclusion of the Reorganization Court that, unless the New Haven's operations are included in Penn Central on January 1, 1969, the New Haven will cease to operate at that time.

The Trustees have had prepared and distributed as an exhibit proposed to be offered in this proceeding a cash forecast prepared by the Treasurer of the New Haven for the balance of 1968 and the first half of 1969. It is this cash forecast upon which I base my testimony. The Treasurer, Mr. Berg, will also be available as a witness.

The significant and inescapable fact is that there will not be enough cash to carry on operations beyond the early part of November without additional borrowing. We have already borrowed $10,000,000 under the loan agreement with Penn Central, previously approved by the Commission.

While there remains a balance of $15,000,000 that could be borrowed from Penn Central, the conditions and formula of the loan agreement will permit us to seek only $4,000,000 in November. That sum would carry operations into January, 1969 on our present forecast. Assuming that Judge Anderson would permit such a borrowing, and this will be a question to be heard by him in October, we would still be unable to carry operations into February without a further borrowing.

Exhibit R-4

Income Statement Introduced by New Haven Trustee's Witness, John P. O'Sullivan

Table I

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY
INCOME STATEMENT
(000 omitted)
YEAR 1967 AND SEVEN MONTHS PERIOD ENDED JULY 31, 1968

	(1)	1967 (2)	Seven Months ended July 31, 1968 (3)
1	Railway Operating Income:		
2	Railway operating revenues	$ 120,105	$ 70,716
3	Railway operating expenses	115,655	69,971
4	Net revenue from railway operations	4,450	745
5	Railway tax accruals	10,231	6,704
6	Railway operating income	(5,781)	(5,959)
7	Equipment Rents—Net Debit	9,840	5,996
8	Joint Facility Rents—Net Debit	4,558	2,624
9	Net railway operating income	(20,179)	(14,579)
10	Other Income:		
11	Miscellaneous rent income	1,214	730
12	Income from non-operating property	5,824	3,794
13	Dividend income	28	3
14	Interest income	684	203
15	Income from sinking and other reserve funds	542	244
16	Miscellaneous income	2,245	826
17	Total other income	10,537	5,800
18	Total income	(9,642)	(8,779)

( ) Indicates deficit

Exhibit R-4

Table I (Continued)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
INCOME STATEMENT
(000 omitted)

YEAR 1967 AND SEVEN MONTHS PERIOD ENDED JULY 31, 1968

	(1)	1967 (2)	Seven Months ended July 31, 1968 (3)
19	Miscellaneous Deductions from Income:		
20	Miscellaneous rents	316	186
21	Miscellaneous tax accruals	846	521
22	Miscellaneous income charges	2,916	789
23	Total miscellaneous deductions	4,078	1,496
24	Income available for fixed charges	(13,720)	(10,275)
25	Fixed Charges:		
26	Rent for leased roads and equipment	763	430
27	Interest on funded debt:		
28	(a) Fixed interest not in default	1,627	1,013
29	(b) Interest in default	3,355	1,957
30	Interest on unfunded debt	25	8
31	Amortization of discount on funded debt	24	12
32	Total fixed charges	5,794	3,420
33	Income after fixed charges	(19,514)	(13,695)
34	Other Deductions:		
35	Interest on funded debt:		
36	(c) Contingent interest	—	—
37	Net Income after Fixed Charges and Other Deductions	$ (19,514)	$ (13,695)

( ) Indicates deficit

Exhibit R-16

Prepared Rebuttal Testimony of Charles C. Shannon a Witness for the New Haven Bondholders

—1—

My name is Charles C. Shannon and I reside at 79 Falcon Road, Livingston, New Jersey. I am President of Wyer, Dick & Co., transportation consultants, with offices located at 250 Bellevue Avenue, Upper Montclair, New Jersey.

I have previously appeared as a witness in these proceedings; my prior direct testimony is in evidence as Exhibit NHI-104. My background and experience, which includes service on the New Haven Railroad as Operating Vice President and Executive Vice President, is set forth in my prior direct testimony.

At the request of counsel for the United States Trust Company of New York, Manufacturers Hanover Trust Company and The Chase Manhattan Bank, N.A., the indenture trustees of the three bond issues of the New York, New Haven and Hartford Railroad Company, the First Mortgage 4% Bondholders Committee, and Oscar Gruss & Son, I have studied the question of whether it would be feasible to provide railroad service to the areas now used as the Oak Point and Harlem River Yards of the New

—2—

Haven, both located in Bronx County, New York, if the New Haven were to terminate rail operations and sell these properties.

By reason of my background, I am generally familiar with the property involved. In addition, in preparation for my testimony, I have together with another representative of Wyer, Dick & Co., made a physical inspection of the New Haven property and facilities in the area, have conferred with New Haven operating personnel directly responsible

Exhibit R-16

for the operation of these two yards and have also reviewed the testimony of Mr. Weaver, a witness called by Penn Central and the work papers on which he based such testimony. My testimony also incorporates some engineering opinion and advice developed under my direct supervision by Mr. J. D. Storm, P.E., a Vice President of Wyer, Dick & Co.

In my opinion, rail service into and through this area would undoubtedly continue even if the New Haven were liquidated, in view of the large volume of existing and potential traffic in the vicinity. Mr. Weaver has in no way indicated that Penn Central would discontinue its Port Morris line, which reaches the boundary of the area, in the event of liquidation of the New Haven, although he implies (without expressly so stating) that it would not acquire existing New Haven trackage to other parts of the area,

particularly the Hunts Point Market. I believe that Penn Central would make every effort necessary to reach and service industries in the area. If for any reason Penn Central would choose not to serve the area, a third party such as the City of New York, a line haul competitor, an independent terminal railroad, or an industrial developer would almost certainly acquire the trackage necessary to serve rail customers.

Any carrier or operator serving the area would, in my view, be able and anxious to serve new industries locating throughout the area.

Present Service

To service the present traffic in the Oak Point and Harlem River areas, the New Haven normally employs 9 yard engine assignments per day plus other supporting person-

nel. Switching requirements at the Hunt's Point Market are provided by the New Haven, where it has an additional assignment of four yard engines, plus a hauling assignment between Oak Point Yard and the market area. Thus the present traffic level is handled by a total of 14 switch crews for a 24 hour period.

—4—

Normal mainline train service in and out of Oak Point is provided by a regularly scheduled train in each direction between Cedar Hill and Oak Point and shuttle service is provided between Oak Point and Bay Ridge. It is also possible for through trains operating between Cedar Hill and Bay Ridge to set out and pick up traffic at Oak Point Yard.

There presently is a substantial interchange of traffic between Penn Central and New Haven at Oak Point Yard No. 1 using the Penn Central's Port Morris branch. According to the work papers of Mr. Weaver, as many as 147 cars have recently moved from the Port Morris branch into the Oak Point Yard in a single day. From my understanding of the Penn Central practices and routes as described during the work paper examination, these cars move into the New York City area, for the most part, on through Penn Central trains from Selkirk or points west to Westchester Yard. They move by local switchers to Port Morris interchange.

Present and Potential Traffic

The recently established Hunts Point Market, located ap-

—5—

proximately two rail miles from Oak Point Yard is served by the New Haven from Oak Point. This market is the largest receiver of rail traffic in the area, nearly all of which

Exhibit R-16

arrives at Oak Point via the Port Morris branch of Penn Central. In August, 1968 Penn Central delivered 2328 cars to New Haven at Oak Point, 1127 cars was traffic for Hunts Point, approximately five cars per day for the market arriving via the New York Connecting Railroad.

Plans are now under way to expand the Hunts Point market to the east and to the south. According to recent announcements, citrus fruit and meat are the next commodities scheduled to be included in the market. In addition it is anticipated that the ultimate market development will be extended to include wholesale markets for butter and eggs, fish and flowers. The citrus auction is now conducted on the Penn Central Hudson River Piers in Manhattan.

—6—

This is traffic on which Penn Central presumably receives line haul revenue which would be largely lost if there were no Penn Central rail service to the Hunts Point area. A substantial portion of Penn Central's existing traffic to the Westchester Avenue yard on the Port Morris branch is meat traffic. Penn Central undoubtedly enjoys line haul revenues on much of this traffic, which would also largely be lost after the move to Hunts Point if there were no Penn Central service there.

The Hunts Point Market was located on its present site after extensive site location studies which considered rail access to be of prime importance. It is obvious to me that the continued success and growth of this market depends on continued adequate rail service. The size of the present investment in the Hunts Point Market together with the recently announced plans for expansion of the market indicate to me that the City of New York and other public bodies would be most concerned with any decision by Penn Central not to continue to serve the area.

Exhibit R-16

In addition to the Hunts Point Market I understand there

—7—

are approximately 50 other industries located in the Oak Point and Harlem River area that are rail customers and have rail sidings. I understand that approximately 50 cars per day for these industries are received via the New York Connecting Railroad and from 50 to 75 cars per day via New Haven direct, generally traffic received from other railroads at such points as Springfield and Worcester and accumulated at Cedar Hill.

On my recent field inspection of the property I saw evidence of extensive construction in the area of the old coal yard at Oak Point. I was advised that this will be a deep water berth together with supporting warehouse facilities and that there would be substantial movement inland by rail.

With these developments in mind, together with the recent sales and leases noted in my review of Mr. Weaver's work papers, I believe that there is a substantial traffic potential and need for rail service in this vicinity, even without regard to possible future industrial development in the Oak Point and Harlem River area.

—8—

Access and Adequacy of Connections

Insofar as access to the Oak Point and Harlem River yard area is concerned, there are at present two direct connections to the mainline rail network of the United States, in addition to the existing New Haven mainline to New England which it is assumed here will be abandoned.

The connection made with the Port Morris branch of the Penn Central and thence with Penn Central's mainline to Albany and the west, has already been described. According

to the maps in Mr. Weaver's work papers, the Port Morris branch of the Penn Central is double tracked for its entire length except for a few hundred feet of single track at the Melrose connection. In addition, rail service into this area is presently provided over the line of the New York Connecting Railroad via the Hell Gate Bridge and a track connection to Bay Ridge, Brooklyn. Cars are now floated into Bay Ridge from the New Jersey pierheads for the Jersey Central, Baltimore & Ohio, Penn Central and Lehigh Valley Railroads. The New York Connecting Railroad is a multiple-track, high-speed electrified line.

—9—

A third means of providing rail service to the area would be the use of carfloats to Oak Point. The New Haven formerly operated five float bridges at this point but they were abandoned several years ago. These bridges would require rehabilitation but after rehabilitation, they would provide a practical access to the Oak Point-Harlem River area by any of the present harbor carriers.

Mr. Weaver stated that clearances would pose a substantial problem in providing access to the New Haven yard properties. In reviewing his testimony and work papers we were unable to determine the minimum clearance on the Port Morris branch or on the Penn Central's mainline to Albany or the location of the points of restriction. It may be noted that clearance restrictions do not prevent the existing substantial interchange with the Port Morris branch. Mr. Weaver's testimony does not consider the alternate route to the area via the New York Connecting Railroad.

While it is true that as a general rule railroad equipment

—10—

is getting larger and heavier, it is equally true that rail-

roads generally try to protect their traffic by improving their lines to insure adequate clearance and capability to retain traffic using the newer equipment.

We have not made a detailed engineering study of either the Port Morris branch or the New York Connecting Railroad, but I feel that such improvements could undoubtedly be made or that alternates would be found by Penn Central to retain existing traffic in the area. Improvements to remedy any existing inadequacies would likewise provide more attractive rail service to industries planning to locate in the area. Over the past several years there have been innumerable examples of rail and line improvements which were made for the purpose of improving clearances and loading capacities. In light of these fairly standard railroad practices, we consider that adequate rail access to the site does now and will continue to exist.

Anticipated Rail Service in Area

The logical conclusion derived from all the foregoing is that a backbone rail system, using some of the present New

Haven tracks, and connecting with the Port Morris branch, the Bay Ridge line, or carfloat operations, would continue to exist in the Harlem River, Oak Point and Hunts Point area even if the New Haven were to be liquidated.

It is impossible to determine at this time just what physical form the rail support facilities would take. There would almost certainly be a rail connection of one or more tracks from the Harlem River yards through to the north end of the Oak Point complex, a distance of about two miles, and beyond to Hunts Point. The quantity and configuration of tracks would be based entirely upon the operating plan of

the serving carrier. The extent to which New Haven property would be required for local switching depends to a large extent on the amount of pre-classification that can be done at other rail yards. With the opening of the Alfred E. Perlman yard in Selkirk, New York, Penn Central now has the capability of doing an increased amount of pre-blocking. After the meat market moves to the Hunts Point site, Penn Central's Westchester Avenue yard facility, located about one mile from Oak Point, could become available for support switching.

—12—

The portion of the New Haven property not needed for yard trackage would become available for industrial development and would have access to mainline rail service. If a rational development plan is followed and plant construction is carefully coordinated, rail access to all parts of the area could be afforded. In my judgment, the industrial development department of any railroad serving the area would seek intensive utilization, by traffic-generating industries, of the portion of New Haven property not required for continued rail facilities.

The common industry practice in providing industrial sidings for new customers is that the customer pays for the cost of the siding and connections and the railroad is responsible only for the cost of constructing the turnouts required. Thus, these expenses mentioned by Mr. Weaver as a barrier to extension of rail service to new industries, are actually normally incurred by any industry which wishes to obtain rail service.

As stated before, I believe that Penn Central will find the means to serve the present as well as future industries in the area since it is unlikely that any carrier would allow

a competing line haul railroad to gain access to a presently captive development.

—13—

If for any reason Penn Central or another line haul carrier were unable or unwilling to take the operation over, an independent terminal railroad operation in this area would appear to be feasible, in view of present and potential traffic volumes. Such operation might be performed by a public body or by private interests. Still another feasible alternative might be for an industrial developer to perform switching for all the industries in the area and be compensated by connecting line haul carriers serving the area either directly or by floating.

Conclusions

Based on the above it is my conclusion that if the New Haven Railroad were to cease operations:

1. Rail service would be maintained to Hunts Point Market, to other industries now located in the vicinity of the Oak Point and Harlem River yards and also to other new rail industries who chose to locate in the area.

2. Penn Central would probably undertake to provide this service in order to protect its long haul freight revenues.

3. A concentrated effort would be made to locate other rail oriented industries in the vicinity.

—14—

4. If Penn Central, for some reason, chose not to serve this traffic itself, some other operator would provide or contract for the basic rail switching service.

Exhibit R-16

5. Certain, presently undefinable portions of the yard properties would be retained by the new rail operator for use in rail service and the balance of the property would be available for industrial development with adequate rail access.

6. The foregoing assumes that, upon liquidation of the New Haven, the Oak Point and Harlem River yards would be continued to be devoted to industrial rather than to residential use.

Charles C. Shannon
September 30, 1968

Exhibit R-19

Prepared Testimony of Lawrence S. Ritter a Witness for the New Haven Bondholders

• • • • •

—1—

Concerning the Prepared Testimony of Robert E. Simon, Jr.

This statement is directed only to that part of the prepared testimony of Mr. Simon which relates specifically to the method and implications of discounting future receipts to find their present value. I am not qualified to comment on the other aspects of his testimony.

On pages 4-5 of his prepared statement, Mr. Simon notes that:

> "It is at this point that my approach to valuing a large-scale land holding departs from that which I am advised has heretofore been adopted by the Interstate Commerce Commission in this proceednig. I am advised that the figures for net proceeds for each year of the marketing period have been *merely* discounted to present worth at 6%. *However, the foregoing calculation does not take into account the cost of money tied up in the investment.* This is an essential

—2—

> factor both from the standpoint of the present owner of real estate and any prospective buyer. *In any computation designed to reach a fair market value of land which is not income-producing there must be a factor for the use of the money required to buy the property.* The fundamental fact is that the cost of the money invested is an expense of holding real estate, and the calculations which I have previously described omit such expense." (Emphasis added.)

Exhibit R-19

On page 8 Mr. Simon appears to repeat his contention that "a very substantial discount below the assumed net proceeds, *even after the present worth discount*, is essential." (Emphasis added.)

Either I do not understand Mr. Simon correctly or else he misunderstands the implications of standard discounting procedure, such as used by the Interstate Commerce Commission to find present value. He implies that "merely" discounting to present value does not adequately take into account "the cost of money tied up in the investment." If this is indeed what he is saying, then I believe he is in error. The function of the Commission's application of a discount rate was precisely that: to take account of the cost of money tied up in the investment. A second round of discounting, such as Mr. Simon seems to suggest, would be inappropriate since the purpose has already been fully realized once the initial discounting process has been applied.

Regardless of the discount rate that may be used—the

choice of any particular rate being a separate issue—the very reason future receipts are discounted to find their present value is because a dollar in hand today can be employed to earn interest and thereby return more than a dollar a year from now. Thus, the possession of one dollar today is more valuable right now than a dollar which will not be received until a year from today. If a dollar in hand today is more valuable to its owner than a dollar which will not be available until a year from now, it follows that the *present* value of a dollar due a year from now must be less than a dollar in hand today. It is worth less precisely *because* the money is "tied up" for the year and

is thus unavailable during that period for alternative interest-bearing uses.

Mr. Simon notes that "in any computation designed to reach a fair market value of land which is not income-producing there must be a factor for the use of the money required to buy the property." Although it is common to arrive at the fair market value of property by means that do not directly involve discounting, as for instance, by the use of actual unit prices at which things have recently been sold, I would agree with Mr. Simon that a potential purchaser expecting to hold property should analyze the purchase in terms, among other things, of "a factor for the use of money required to buy the property" during the holding period. That is, in considering the purchase of

—4—

any asset which one expects to hold, allowance must be made for the use of the money required to buy it during the period the asset will be held. This money could, after all, have been used in alternative ways—to buy a Government security, a share of stock, or another asset. And this is precisely the very reason why the discount process is undertaken. To discount a second time for the same purpose would be redundant.

* * * * *

Exhibit R-27

Prepared Testimony of Frederick E. Weaver a Witness for the Penn Central Railroad Company

* * * * *

—1—

My name is Frederick E. Weaver. I reside in Yonkers, New York. I am Manager-Operating Procedure of Penn Central Company ("Penn Central"). My office is located at 466 Lexington Avenue, New York, New York.

I have been employed by Penn Central (or, prior to the merger, The New York Central Railroad Company) since 1929. In my present capacity, I am responsible for analyzing the operating procedures of Penn Central and proposing changes which will bring about more efficient operations. My responsibilities are system-wide. I have held my present position since August of this year. Prior thereto, I was Assistant to the General Manager of the New York District of The New York Central Railroad Company. I held that position for over three years and was assigned to head up the NYC-PRR Merger Group on the New York District. Among the other positions which I formerly held with The New York Central Railroad Company were (a) Transportation Superintendent of the River Division, with headquarters at Weehawken, New Jersey, (b) Transportation Superintendent of the New York Terminal Division, and (c) Assistant Superintendent of the New York Terminal District. I have been concerned with problems relating to the operations of the railroad for the past 15 years.

—2—

I am fully familiar with the facilities and operations of the Port Morris Branch of the Penn Central, which runs from the tracks of the Harlem Division of Penn Central at

Exhibit R-37

Melrose Avenue in the Bronx to the Port Morris Yard of Penn Central just south of East 149th Street and east of Bruckner Boulevard in the Bronx. I am also familiar with the present interchange connection at Port Morris, New York, between the Port Morris Branch and the New Haven's tracks on the southwest end of the New Haven's Oak Point Yard.

My testimony is directed to the question of whether industries locating in the New Haven's Oak Point and Harlem River Yards might reasonably expect to receive service from Penn Central upon the assumption of liquidation of the New Haven and removal of New Haven rail service from these Yards. In my opinion, on this assumption, there would be no Penn Central rail service to industries located there.

The present interchange connection with the New Haven at Port Morris consists of a single track which runs from the Penn Central's tracks, at a point where those tracks proceed in a southeasterly direction into the Port Morris Yard, and turns sharply in a northeasterly direction to

connect with the New Haven's interchange track leading into the New Haven's Oak Point Yard. The interchange track from the underpass under the New Haven's main line tracks is an inclining plane of approximately 1.7 percent grade. The traffic movement over the interchange connection is primarily from Penn Central to the New Haven. Cars arrive at the New Haven's Oak Point Yard unclassified and are classified by the New Haven at the Oak Point Yard. Cars moving via this interchange for the New Haven's Harlem River Yard are moved by the New Haven yard crews from the Oak Point Yard over the New

Haven's main line to the Harlem River Yard in a reverse movement from that received from Penn Central at the interchange connection. A direct head end movement from the interchange track into the Harlem River Yard is not possible.

The center of the present interchange track is Penn Central's rail point nearest to the Oak Point and Harlem River Yards. Any shipper locating in the Harlem River or Oak Point Yards desiring to obtain rail service from Penn Central would have to provide a track connection to this point and would have to incur the expense of purchasing the necessary tracks and right of way. In the case of the Harlem River Yard, this would require purchase of about two miles of track, right of way and superstructure north from that Yard to Oak Point. The shipper

would have to maintain the tracks and related services, pay the taxes and, to the extent applicable, pay for switching in addition to the regular line haul rates.

The present tracks in the Oak Point float yard area cannot be used for a direct head end movement from the interchange to the Yard because the float yard tracks point northward in a direction opposite from the interchange track. In order to utilize these tracks for industry side tracks, the shipper would have to purchase in addition the New Haven's tracks north of Oak Point so that a reverse movement of cars could be made from the interchange into the Oak Point float yard area. If the property immediately adjacent to the Penn Central interchange connection, that is, the New Haven's portion of the interchange track and Oak Point Yard #1, were sold to New York City for continued service to the Hunts Point Terminal Market or to

an industry not interested in rail service, access to any other industry in the Oak Point or Harlem River Yards would be blocked and there could be no rail service furnished by Penn Central to this industry.

Penn Central does not have the yard facilities to serve industries located in the Oak Point and Harlem River Yards. Its Port Morris Yard, located southeast of the

—5—

interchange track, is unable to perform this service. As a result of land sales and long-term leases, the Port Morris Yard has no capacity to provide any of the switching, classification or holding of car operations which would be required.

The only switching and classification facility located on Penn Central's Port Morris Branch is Penn Central's Westchester Avenue Yard, located north of Westchester Avenue and east of Brook Avenue in the Bronx. This Yard is already being used to its full capacity and hence cannot absorb the additional workload which would be involved in switching and classification of freight cars serving industries at the Oak Point or Harlem River Yards. Penn Central has no yard facility within the immediate switching district with the capacity in which to perform this service.

In addition, rail service for the Oak Point and Harlem River Yards via the Port Morris Branch of Penn Central would be subject to a number of clearance restrictions which further make such service physically and economically unsound. The entire Port Morris Branch, as well as Penn Central's main line on the Hudson Division south of Tarrytown, New York is subject to clearance restrictions as to height and width of cars. In my opinion, the indus-

Exhibit R-27

tries most likely to be interested in the New Haven's Yards are distribution industries, whose products move by rail inbound and are distributed in the New York area by trucks. The high cube type of freight cars, which are increasingly utilized by this type of industry in order to secure more favorable rates, will not pass the clearance restrictions on the Port Morris Branch.

Accordingly, because of all the foregoing circumstances, it is my opinion that there would be no rail service for any industries locating in the New Haven's Harlem River and Oak Point Yards after a liquidation of the New Haven.

Exhibit R-29

Prepared Testimony of Robert E. Simon, Jr., a Witness for the Penn Central Railroad Company

* * * * *

—1—

My name is Robert E. Simon, Jr., and I reside at 322 East 57th Street, New York, New York.

I was born in 1914 and graduated from Harvard University with an A.B. Degree in 1935. I served in World War II from 1942 to 1946, moving from the rank of private to captain in the U.S. Army.

Since my graduation from college in 1935, I have been president of Simon Enterprises Co., Inc., a family-owned real estate company which owns and manages office, commercial and residential properties in the United States and Canada.

In 1961 I arranged the purchase of a 7,000-acre tract of land 18 miles from Washington, D.C., and until a year ago headed the organization responsible for planning this tract as the New Town of Reston, Virginia—a community for 75,000 people. Reston is known for its somewhat revolutionary approaches to large scale land development.

I am presently and for the past year have acted as special counsel to Secretary of the Interior Udall on land use policies affecting the lands owned by American Indians for which he acts as Trustee.

—2—

I have been a member of the Board of Governors of The Real Estate Board of New York, Inc. and have been a director of Adler Electronics, Inc., Kordite Corporation and Fablok Mills. I was for some 20 years president of Carnegie Hall, New York.

Exhibit R-29

My real estate experience in Reston and the Federal Government involved the problems of financing, developing and marketing large-scale parcels of real estate. The testimony which follows is based on that specific experience and on my general knowledge of the field of large-scale land development.

I have been asked to express an opinion as to the relationship of the fair market value of land in bulk as compared with the projected net proceeds of "retail" sales of the same land in smaller parcels.

Based on my experience, a sale in bulk of land at any given point in time will be made at a price substantially below the amounts which the owner might expect to derive from carrying out a retail sales program of his own. The bulk sales price would be substantially below the aggregate retail values projected by the owner, less assumed holding and disposition costs and further discounted by the factor reflecting present worth of receipts in the future.

—3—

To relate this proposition to the real estate owned by the New Haven Railroad, I shall first enumerate certain assumptions I am making:

(1) That the appraised value of the real estate involved is virtually all represented by land as distinct from buildings.

(2) That such land has been carefully appraised by reliable real estate appraisers.

(3) That a realistic projection of a time-table for the marketing of such land has been prepared, which I shall assume calls for sales over a six-year period.

Exhibit R-29

(4) That, in recognition of the difficulty of selling certain undesirable parcels, and the advantages of bringnig the liquidation period to an end, the appraised value of the land estimated to be unsold at the end of the fourth year has been marked down substantially, for purposes of estimating the gross proceeds of the fifth and sixth year of the marketing period.

(5) That realistic estimates of holding costs (other than the cost of invested money) and selling expenses have been made, which include the following:

(a) Real estate taxes accruing during the marketing or liquidation period;

—4—

(b) The salaries and expenses of the staff engaged in the selling effort;

(c) The brokerage fees and advertising costs involved in the promotion and sale of the real estate;

(d) The cost of the appraisals required for disposing of the real estate;

(e) The transfer taxes involved in the sales; and

(f) Contingencies.

(6) Whatever rental income the real estate may bring during the marketing period has been offset against the total expenses.

(7) That the estimated holding costs and selling expenses have been appropriately allocated among the years of the liquidation period, and that, by subtracting the allocated expenses from the projected gross proceeds of sales in each of the respective years of the marketing period, a figure for estimated net proceeds of each year of the liquidation period has been determined.

Exhibit R-29

It is at this point that my approach to valuing a large-scale land holding departs from that which I am advised has heretofore been adopted by the Interstate Commerce

—5—

Commission in this proceeding. I am advised that the figures for net proceeds for each year of the marketing period have been merely discounted to present worth at 6%. However, the foregoing calculation does not take into account the cost of money tied up in the investment. This is an essential factor both from the standpoint of a present owner of real estate and any prospective buyer. In any computation designed to reach a figure for fair market value of land which is not income-producing there must be a factor for the use of the money required to buy the property. The fundamental fact is that the cost of the money invested is an expense of holding real estate and the calculations which I have previously described omit such expense.

The going rate of interest on large mortgages on undeveloped land is about 9%, and often considerably more. I am currently engaged in transactions which will be based on a rate in excess of 9% for the cost of money. Moreover, these rates have prevailed for the past several years and were going rates as at the end of 1966.

Other factors which are not reflected in the discounting of future net proceeds at 6% include the following:

—6—

(1) The uncertainty as to the precise time period for marketing the real estate is a tremendously important factor. In the financing, holding and disposition of real estate, time is unquestionably the most critical factor. Delays in realization of cash proceeds, as compared with the owner's projected schedule of receipts, can cause serious economic

loss. The very best projections can and often do go awry. Since the equity owner is burdened with carrying charges, including both taxes and interest on borrowed capital (or the equivalent value of invested cash), he is placed in an extremely difficult position as a result of delay.

—7—

(2) The indeterminate element of managerial responsibility has a value. An owner must supervise, in one degree or another, the marketing program. The responsibility for giving overall direction, for finding, retaining and supervising a staff and assuring that such staff is working effectively—these are all elements of the managerial or enterpreneurial role that an owner (including a corporate owner) cannot escape and which command a price in the market.

(3) There are always risks of unforeseen developments which frustrate marketing plans or depress values. Although risks in connection with land ownership are far less than in connection with other enterprises, there are always potential eventualities which can adversely affect ultimate proceeds. Examples are unsuspected defects of title, zoning changes, construction of incompatible structures on neighboring parcels, legal entanglements with municipalities, unforeseen site conditions, and many other imponderables.

(4) Since any opinion as to fair market value assumes a willing seller and a willing buyer, a factor should be included which reflects some margin of profit to a prospective buyer. A willing seller must take into consideration the motivation of a willing buyer, and market value is a reflection of the accommodation of their respective interests. This is just as true in the case of sales of land at retail as in bulk.

Exhibit R-32

Prepared Testimony of Ralph E. Badger
Penn Central's Witness (Excluded—Rec. 381c)

(Letterhead of Debevoise, Plimpton, Lyons & Gates)

Dr. Ralph E. Badger
Standard Research Consultants, Inc.
345 Hudson Street
New York, New York

New Haven Fair Market Value Analysis

Dear Dr. Badger:

This will confirm certain supplementary instructions, assumptions and considerations I have furnished to you.

A. *Sales in Pre-Liquidation Period*

(1) Please consider that the $9,063,800 of investments scheduled for sale in the first year of the liquidation period could be sold in the first year of the pre-liquidation period.* We have asked only that you consider this factor, and not that you necessarily use it in your detailed calculations.

(2) Please consider that some $3,000,000 of real estate could be sold in each year of the pre-liquidation period, and (so long as the pre-liquidation period does not extend more than three years) these sales should be considered as being advanced from the sales otherwise scheduled for the first year of the actual liquidation period. In giving consideration to this factor, we suggest that you assume, for purposes of simplicity, that $500,000 of expenses is shifted forward with such sales, so that there are net proceeds of $2,500,000 moved from the first year of the liquidation period to each year of the pre-liquidation period.

• • • • •

* We have asked you to ignore a relatively minor shift in the time of sale of two investments not included in the $9,063,800 (which aggregate $1,472,300 in estimated liquidation value).

Exhibit R-33

Submitted Prepared Testimony of Robert L. Schlesinger, Penn Central's Witness (Excluded—Rec. 381c)

* * * * *

(Letterhead of Debevoise, Plimpton, Lyons & Gates)

September 20, 1968

Mr. Robert L. Schlesinger
Director of Financial Services
EBS Management Consultants Incorporated
100 Church Street
New York, New York

Dear Mr. Schlesinger:

This will confirm certain supplementary instructions and assumptions I have furnished to you.

1. *Sale of investments*

Assumed that certain investments are put up for sale when the Pre-Liquidation Period commences, and are sold within the time periods indicated:

Investment	*Value per I.C.C.*	*Year of sale, after commencement of Pre-Period Liquidation*
Fruit Growers Express Co.	$ 321,400	1
Providence Produce Warehouse Co.—stock and notes	8,516,400	1
New England Car Co.	16,200	1
Business development corporations—stock	17,500	1
Real estate mortgage notes	192,300	1
Railway Express Agency, Inc.—stock and notes	1,272,300	3
Pullman Co.—stock	200,000	6

Exhibit R-33

No expenses will be attributed to the sale of these investments.

It will be assumed that all other investments are retained until the liquidation period begins.

2. *Sale of land*

Assume that land sales are made in each year of the Pre-Liquidation Period at the rate of $3,000,000 per year. In allocating this volume of sales to the sales which would otherwise occur during the liquidation period, assume that, for the first three years of a Pre-Liquidation Period, the $3,000,000 is to be deducted from the sales which are otherwise scheduled for the first year of the liquidation period. If the Pre-Liquidation Period extends into a fourth or fifth year, it will be assumed that the figure of $3,000,000 of land sales for each of those years is to be deducted from the sales otherwise scheduled for the second year of the liquidation period.

Assume the impact on liquidation expenses will be as follows:

(a) The ratio of $3,000,000 to the volume of land sales scheduled for the first year of the liquidation period is 10.58%

(b) Accordingly, 10.58% of the expense of land sales otherwise attributed to the first year of the liquidation period will be assumed to move forward to each year of the first three years of a Pre-Liquidation Period. The same prorating process would apply to the accrued real estate taxes and pre-bankruptcy interest scheduled to be paid in the first year of the liquidation period.

Exhibit R-33

(c) The ratio of $3,000,000 to the volume of land sales scheduled for the second year of the liquidation period is 7.7%

(d) Accordingly, 7.7% of the expenses of land sales otherwise attributed to the second year of the liquidation period will be assumed to move forward to the fourth and fifth year of a Pre-Liquidation Period. The same prorating process would apply to the accrued real estate taxes and pre-bankruptcy interest scheduled to be paid in the second year of the liquidation period.

• • • • •

Exhibit R-38

Prepared Testimony of Norman J. Hull, a Witness for the Penn Central Railroad Company

—1—

My name is Norman J. Hull, Jr. I am Director—General Accounting of Penn Central Company, at 15 North 32nd Street, Philadelphia, Pennsylvania. I have testified previously in these proceedings, and the following testimony and exhibits prepared by me have been received in evidence: NHI-82 through 86, NHI-92, and NHI-93 and 93A. My qualifications and present responsibilities are as stated in my prior testimony.

This testimony is offered in rebuttal to the testimony of Drs. Edward I. Altman and Lawrence S. Ritter, and of New Haven Trustee Richard Joyce Smith, served September 23, 1968.

A. *Discounted Net Liquidation Receipts*

As did Dr. Altman, I have prepared an analysis of the present cash value of the projected net liquidation receipts which would be received by the New Haven over a 6-year period according to the Gordon liquidation study (NHI-41 and 42), as modified in the Commission's Second Supplemental Report, dated November 16, 1967. I have made the same assumptions stated at pages 4-5 of Dr. Altman's prepared statement. In particular,

—2—

1. I have relied on data in the prior testimony and exhibits without taking any position as to its validity. Where discrepancies have appeared, I have noted them and have specifically stated how I treated them in my analysis.

Exhibit R-38

2. I have utilized the same 6% discount rate used by Dr. Altman and have applied it to the net liquidation receipts (gross receipts less expenses).

The data I have used and my calculations are set forth in Schedules A, B and C hereto. The present value of the projected net liquidation receipts, as shown on Schedule C hereto, is $122,240,461. This figure is $1,351,539 lower than that reached by Dr. Altman.

The following is a summary of the differences between my analysis and that of Dr. Altman.

1. *Schedule A—Liquidation Proceeds (per Commission Report) and Schedule of Receipts*

My Schedule A shows total liquidation receipts of $183,593,267, a figure $635,267 higher than that reached in Dr. Altman's Appendix A.

(a) *Receipts from land sales:* These receipts are shown in Dr. Altman's Appendix A in the left-hand three columns under "RECEIPTS" and in my Schedule A under the heading "Properties—Land". We have both subdivided these receipts into three categories—receipts computed by

(i) Mason, (ii) Thompson and (iii) McCann. Our figures as to the McCann receipts are identical, except that Dr. Altman rounded off his figures to the nearest thousand. The same is true of our figures as to the Mason receipts, except in the first year of liquidation, where I have shown $17,419,149 in receipts as contrasted with the $19,216,000 shown by Dr. Altman. The difference of approximately $1,797,000 is attributable to a deduction which Mr. Gordon made from his land receipts for the expenses of removal of buildings which were not to be sold (Tr. 23360-61, 1/25/67). With respect

to the Thompson receipts, my schedule shows receipts of $1,837,189 as contrasted with Dr. Altman's figure of $1,200,000. The difference of $637,189 results from an understatement by Dr. Altman of the Thompson receipts, an understatement referred to at page 7 of his prepared statement. Additionally, because Mr. Thompson did not indicate the years in which his $1,837,189 would be received, I prorated the Thompson receipts among the six years in the same ratios as the allocation made by Mr. Mason, as did Gordon, whereas Dr. Altman included the $1,200,000 all in the first year of liquidation.

As a result of the foregoing, I show total land receipts of $103,732,267, a figure approximately $1,161,000 lower than that reached by Dr. Altman.

—4—

(b) *Receipts from other road property:* These receipts are shown in Dr. Altman's Appendix A in the fourth column under "RECEIPTS" and in my Schedule A under the heading "Properties—Other road property". In this category, I show receipts of $36,239,600 in contrast to Dr. Altman's figure of $34,443,000. The difference of approximately $1,797,000 is again attributable to Mr. Gordon's deduction of the expenses of removal of buildings from his land receipt figures. In footnote (d) to Dr. Altman's Appendix A, he subtracted from Gordon's total figure for "Road & Miscellaneous Physical Property Account", a total of $113,706,700 for land, whereas he should have subtracted $111,909,886 to account for the foregoing building removal expenses.

Like Dr. Altman, I spread these receipts for other road property equally over the first three years of liquidation.

(c) *Receipts from other assets less assets retained:* These receipts are shown in Dr. Altman's Appendix A in

the fifth column under "RECEIPTS" and in my Schedule A under the following headings: "Materials and Supplies", "Investments", "Equipment" and "Account 741 Assets Not Retained by the New Haven". We both reached the same

figure for total receipts within this category, but Dr. Altman included all the receipts in the first year of liquidation, whereas I included them in the first three years and in the sixth year of liquidation, as follows:

	Total Receipts	*Year*			
		1	*2*	*3*	*6*
Materials and Supplies	$ 2,083,200	$ 694,400	$ 694,400	$ 694,400	
Investments	20,388,800	9,063,800		11,125,000	$200,000
Equipment	19,151,800	12,654,100	6,497,700		
Account 741 Assets Not Retained	1,997,600	1,615,100	268,800	113,700	
	$43,621,400	$24,027,400	$7,460,900	$11,933,100	$200,000

In my judgment, the assumptions I have made as to the time of disposition of these assets are more realistic than that made by Dr. Altman. It is, in my opinion, erroneous to assume that the New Haven's investments can all be sold within the first year at the values found by Mr. Gordon. Also, the New Haven's aging passenger car fleet cannot be effectively disposed of in the first year of liquidation.

2. *Schedule B—Liquidation Expenses*

The total expense figures shown on my Schedule B and on Dr. Altman's Appendix A are approximately the same,

Exhibit R-38

—6—

the only difference being that Dr. Altman rounded his figures to the nearest thousand. Our differences with respect to expenses relate to the manner in which these expenses are spread over the 6-year liquidation period.

(a) *Expenses of land sales*: These expenses are shown in Dr. Altman's Appendix A in the lefthand two columns under "EXPENSES" and in my Schedule B under the heading "Land". A comparison of our analyses follows:

(i) Expenses computed by Mason: There is no difference in our approach here. We both took the expense figures (net of rental income) shown on NHI-58, Appendix A, Sheet 1.

(ii) Expenses computed by Thompson: Dr. Altman included the expenses estimated by Mr. Thompson ($260,000) in the first two years of liquidation, whereas I prorated them among the six years in the same ratios as the market value of the property sold, as shown in my Schedule A.

(iii) Expenses computed by McCann: A summary of these expenses appears on page 4 of NHI-51, and the expenses for real estate taxes and brokerage are further broken down on the succeeding pages for each

—7—

parcel of land. Dr. Altman and I both started by allocating the expenses shown for each parcel to the year in which McCann indicated it would be sold, as follows:

Exhibit R-38

Parcel Number	*Year* 1	2	3	5	6
1	$127,000				
1E	98,000				
3A	15,700				
3B	63,000				
1B		$233,000			
1C		318,000			
1D			$420,000		
1E			29,000		
2				$39,000	
4					$1,480,000
5					19,000
Totals	$870,700	$551,000	$449,000	$39,000	$1,499,000

Whereas the foregoing expense figures for real estate taxes and brokerage total $3,945,030, McCann's summary on page 4 of NHI-51 erroneously shows a total of $3,393,000 fo rthese expenses, a difference of $15,700.

Dr. Altman's methodology was to add up the remaining expense figures shown on McCann's summary

($536,330 for real estate department expenses, appraisal fees and transfer taxes), subtract the foregoing $15,700 on account of McCann's error, and spread the resulting $520,630 in expenses equally over the 6-year period.

My methodology was this: I tried to estimate when the $536,330 in additional expenses would be incurred, with the following result:

Expenses	*Year* 1	2	3	4	5	6
Real estate department	$200,000	$100,000	$50,000	$50,000	$50,000	$50,000
Appraisal fees	25,000					
Transfer taxes	5,000	1,000	1,000		1,000	3,330
	$230,000	$101,000	$51,000	$50,000	$51,000	$53,330

Then I subtracted the $15,700 on account of McCann's error from my 6th-year figure.

(b) *Expenses for operations other than real estate and for taxes on personal property*: Our figures are identical here, except for Dr. Altman's rounding off of his figures.

(c) *Accrued real estate taxes plus pre-bankruptcy interest*: Dr. Altman and I used the same methodology in spreading the $16,199,298 in accrued taxes and interest over the 6-year period. We both assumed the taxes would be paid in the ratio of sales of property in each year to the total value of the appraised property. However, our results differ because of the differences which I have heretofore noted in our calculation of total real estate receipts and of the years in which those receipts would be received.

—9—

3. *Schedule C—Net Liquidation Proceeds (per Commission Report) and Schedule of Receipts*

In Schedule C, I have set forth the total receipts and expenses for each of the six years of liquidation as shown on Schedules A and B. Then I have calculated the total net receipts and applied the same discount rate used by Dr. Altman, arriving at totals in each year and for the six years for discounted receipts, discounted expenses and discounted net receipts.

The following is a comparison of the 6-year totals shown on Schedule C and the comparable figures in Dr. Altman's Appendix A:

—10—

	My Schedule C	*Altman Appendix A*
Total Receipts	$183,593,267	$182,958,000
Total Expenses	50,073,625	50,075,000
Net Receipts	133,519,642	132,883,000
Discounted Receipts	166,629,903	167,998,000
Discounted Expenses	44,389,442	44,406,000
Discounted Net Receipts	122,240,461	123,592,000

Exhibit R-38

Finally, I set forth below the discounts calculated by Gordon, Altman and me, respectively:

	Gordon	*Altman*	*Hull*
Discount of Receipts	$17,563,000	$14,959,000	$16,963,934
Discount of Expenses	—	5,669,000	5,684,000

• • •

SCHEDULE A

Liquidation Proceeds (per Commission Report)
and Schedule of Receipt

	1	2	3	4	5	6	Six-Year Totals
Materials and Supplies	694,400	694,400	694,400				2,083,200
Investments	9,063,800		11,125,000			200,000	20,388,800
Properties							
Land							
Mason (1)	17,419,149	33,374,151	12,688,683	10,834,816	1,500,000	1,500,000	77,316,799
Thompson (2)	446,236	775,020	294,659	251,608	34,833	34,833	1,837,189
McCann	10,479,590	4,737,400	3,220,000	—	322,830	5,818,459	24,578,279
Other road property	12,079,867	12,079,867	12,079,866				36,239,600
Equipment (3)	12,654,100	6,497,700					19,151,800
Account 741							1,997,600
Assets Not Retained by the New Haven	1,615,100 (4)	268,800 (5)	113,700 (6)				
TOTALS	64,452,242	58,427,338	40,216,308	11,086,424	1,857,663	7,553,292	183,593,267

(1) Taken from NHI-58, Appendix A, Column "Market Value—Total". The first year's figure of $19,215,982 has been reduced by $1,796,833, which is the cost of demolishing and removing buildings estimated by Gordon (T. 23360-61).

(2) The gross proceeds estimated by Mr. Thompson have been prorated among the six years in the same ratios as the allocation made by Mr. Mason.

(3) Assumption: all rolling stock other than passenger cars sold in first year; all passenger equipment sold in second year.

(4) Grand Central income in controversy plus estimated salvage or scrap value of equipment retired but not disposed of. (See NHI-42, pp. 34-35.)

(5) Estimated salvage value of lines previously abandoned but not disposed of. (See NHI-42, pp. 34-35.)

(6) Recovery of doubtful receivables previously written off in full. (See NHI-42, pp. 34-35.)

SCHEDULE B

LIQUIDATION EXPENSES

	1	2	3	4	5	6	*Six-Year Totals*
Investments	No Separate Cost						
Land							
Mason (1)	8,534,253	3,624,272	1,971,668	1,810,845	430,633	430,633	11,802,304
Thompson (2)	63,154	109,694	41,704	35,620	4,914	4,914	260,000
McCann (3)	1,100,700	652,000	500,000	50,000	90,000	1,536,630	3,929,330
Taxes accrued to start of liquidation plus pre-bankruptcy interest (4)	4,103,282	5,629,256	2,345,658	1,605,351	860,183	1,655,568	16,199,298
Operations other than real estate (5)	5,009,488	3,678,018	3,564,355	1,131,944	1,131,944	1,131,944	15,647,693
Taxes on personal property (6)	745,000	745,000	745,000				2,235,000
TOTALS (7)	14,555,877	14,438,240	9,168,385	4,633,760	2,517,674	4,759,689	50,073,625

(1) See NHI-58, Appendix A, Sheet 1 (Total Expenses less rental income).

(2) Mr. Thompson testified that he had used a percentage of fair market value in computing expenses. (T. 23510-11.) His expense figure of $260,000 has been prorated among the six years in the same ratios as the market value of the property sold. (T. 23508.)

(3) See NHI-51 and the annexed Schedule A. McCann's 6th year figure should actually be 1,552,330, but he made a mathematical error in the amount of $15,700 in totaling the expenses attributable to brokerage and real estate taxes. This $15,700 was deducted from the figure for the 6th year.

(4) Assumes that the taxes would be paid in the ratio of sales of property in each year to the total value of the appraised property. (Note that Mason's appraised values for 5th and 6th year are before the $8,177,632 selling discount.)

(5) See NHI-42, p. 46. Computed by taking 89.16% of the estimated costs of liquidation in each year (see NHI-42, pp. 38 and 45; the expenses for the last 3 years were spread equally over that period).

(6) See NHI-42, p. 44. The taxes were spread equally over the assumed 3-year disposal period.

(7) The total liquidation expense figure according to Gordon (NHI-41, p. 12) was $59,480,400. The difference between that figure and the above total is represented by the sum of (a) the $8,177,632 discount in the 5th and 6th years and (b) the $1,249,847 in post-bankruptcy interest on accrued real estate taxes which the Commission eliminated from Gordon's figure, less (c) an amount of $20,700 which Thompson deducted from his liquidation expense figures and which in fact merely represented a rounding up of the McCann appraisal of the Bronx properties (see T. 23508).

Exhibit R-38 364c

SCHEDULE C

Net Liquidation Proceeds (per Commission Report)
and Schedule of Receipt

	1	2	3	4	5	6	*Six-Year Totals*
Proceeds	64,452,242	58,427,338	40,216,308	11,086,424	1,857,663	7,553,292	183,593,267
Expenses	14,555,877	14,438,240	9,168,385	4,633,760	2,517,674	4,759,689	50,073,625
Net Proceeds	49,896,365	43,989,098	31,047,923	6,452,664	(660,011)	2,793,603	133,519,642
Discounted Proceeds at 6%	62,574,992	53,469,291	34,690,940	9,014,277	1,423,744	5,456,659	166,629,903
Discounted Expenses at 6%	14,131,919	13,213,035	7,908,729	3,767,671	1,929,587	3,438,501	44,389,442
Discounted Net Proceeds (6%)	48,443,073	40,256,256	26,782,211	5,246,606	(505,843)	2,018,158	122,240,461

Exhibit R-39

Prepared Testimony of Edward I. Altman a Witness for the New Haven Bondholders

• • • • •

—3—

I have been asked by counsel for the Trustees of the First and Refunding Mortgage of the New Haven Railroad, for the Trustee of its General Income Mortgage, for the Bondholders Committee and for Oscar Gruss & Son to analyze the liquidation valuation study of certain property owned by the New York, New Haven and Hartford Railroad Company introduced in the prior hearings before the Interstate

—4—

Commerce Commission, which are gathered in the testimony and exhibit of William Gordon (NHI-41 and NHI-42), together with the modifications of the Gordon figures made by the Commission in its Second Supplemental Report, in order to ascertain the appropriate discounted cash flow, i.e. the present cash value of the net receipts which would be received over time, as shown by those studies. I have relied on data from previous testimony and exhibits supplied to me by counsel and can take no position as to their validity. I understand that counsel for various parties have disagreed, and continue to disagree, with the Gordon study, and the Commission's modifications, both with respect to the gross liquidation value of the assets and as to the expenses of liquidation. I have no basis to pass on these matters; rather, I have assumed both the receipts and the expenses shown in the Gordon study, as modified in the Commission's report, in order to develop the appropriate discounted cash flow applicable to those receipts and expenditures. I consider the method applied generally appropriate for any discounted cash flow analysis.

Exhibit R-39

The major assumptions that I make in this testimony are:

(1) The data which appears in the body of Appendix A is based on material in evidence. Where I found dis-

—5—

crepancies in the data or inputs which could not be estimated accurately, I have noted them in my general comments at the end of this testimony and in the footnotes.

(2) In order to assess the present value of future flows, I have utilized the discount rate (6%) which was applied to gross receipts in prior testimony and was approved by the Commission in its Report (Commission Report, p. 29) but have, as noted above, applied this rate to *net* receipts rather than *gross* receipts.

The premise of my testimony is that whenever a valuation analysis involves cash flow which will be realized at some future date(s) the appropriate methodology to use is a discounted cash flow analysis. The discounting procedure should apply to *net* flows. In the case of income valuation it is correct to discount net income (revenues less costs) and in the present liquidation case the net receipts (gross receipts less expenses) are the relevant data to consider.

Based on the data and calculations which appear in Appendix A, the present value of the projected net liquidation receipts of the New Haven Railroad assets treated is $123,592,000.*

* Appendix A relates only to the assets which are valued in the Gordon study, less the assets which, according to the Commission's Report, will not be included in the sale to Penn-Central under the existing Purchase Agreement. Thus, except as they may be reflected in NHI-42, Appendix A does not reflect any receipts from the so-called Grand Central Terminal properties; neither does it include any reflection of the criticisms made by the United States District Court for the Southern District of New York and by the Reorganization Court.

Exhibit R-39

—6—

The data is itemized for the six-year period which was testified to be the time necessary to liquidate the assets. Explanations for the figures are noted in the footnotes to the Appendix. Column (1) aggregates the gross receipts deriving from the liquidated property; column (2) breaks down and aggregates the expenses; the net liquidation receipts are presented in column (3). The discount factor (column (4)) is then applied to these net receipts, resulting in the final column (5) figures which show the present value (i.e., as of the commencement of liquidation) of projected net liquidation proceeds.

As noted above, I found several possible contingencies which may have an added effect on the final figure for the net liquidation value. First, the $1.2 million of real estate receipts from the sale of the New Haven office building

—7—

documented in footnote (c). I was advised by counsel that this building was considered readily saleable. Since I could not find exact specifications of the timing of such sale (or of the flow therefrom), I treated the flow as occurring in the initial year of liquidation. To the extent that this flow occurs in a later year the discounted receipt is *overstated.**

A second area of inconsistency pertains to the summation of aggregate liquidation receipts from real estate. The appraised value of the real estate shown in NHI-45, p. 29 and noted in footnote (d) is $113,706,700. However, the real estate receipts shown in the body of the Appendix plus the $8,177,633 figure representing an allowance for loss on distress sales of real estate in the 5th and 6th year give a real estate value of approximately $113,071,000.

* Even if the sale was to occur as late as the third year of liquidation, this would reduce net liquidation value by less than $130,000 from the amount shown in Appendix A.

Exhibit R-39

Therefore, the itemized receipts in Appendix A appear to be *understated* by some $635,000. It should also be noted that only cash flows are relevant in a discounted analysis and therefore the $8,177,633 figure does not appear as a receipt, nor as an expense, in my analysis.

—8—

The total expense figure in column (2) does not equal the amount testified to by Mr. Gordon (NHI-41, p. 7) because it does not include the $8 million plus amount already described and is also reduced by $1,249,847 as documented in footnote (f) of my Appendix A.

The receipts shown in the Appendix do not reflect at all the rentals which may accrue from the rental properties on the Harlem River Division, particularly certain structures in the two railroad yards. Mr. Thompson accepted as reasonable a total of approximately $234,000 annual rental for these properties; that rent figure was apparently derived from NHI-52 and NHI-53 (Tr. 23657-58).

• • • • •

In summary, the conclusion of my testimony is that the present value of the projected net liquidation receipts treated is $123,592,000. This result may be viewed in one sense as a reflection of the effect of applying the discounting procedure to expenses; such a process has the effect of giving a present value to such expenses of $44,406,000, which is $5,669,000 less than the total amount of expenses before discounting (shown in column (2) of Appendix A). Moreover, my application of the discounting procedure that I have described to gross receipts produces a lower amount in the discount than Mr. Gordon testified to on cross-

—9—

examination (Tr. 23419-20)—$14,959,000 rather than $17,563,000, a difference of $2,604,000.

Edward I. Altman
September 23, 1968

APPENDIX A

Net Discounted Liquidation Value of Certain New York, New Haven & Hartford Railroad Assets

(In (000's) of Dollars)

	RECEIPTS						EXPENSES									
YEAR	*Real Estate (a)*	*Real Estate (b)*	*Other Real Estate (c)*	*Road Property Other Than Real Estate (d)*	*Other Assets Less Assets Retained (e)*	*(1) Total Receipts*	*Real Estate (a)*	*Estate Real (b)*	*Road Property Other Than Real Estate Costs in Columns (a)&(b) (d)*	*Accrued Real Estate Taxes (f)*	*Taxes on Salvageable Property (g)*	*(2) Total Expenses*	*(3) Net Liquidation Receipts (1-2)*	*(4) Discount Factor**	*(5) Present Value of Projected Net Liquidation Receipts*
1	19,216	10,480	1,200	11,481	43,622	85,999	3,664	958	5,010	4,427	745	14,804	71,195	.97087	69,121
2	33,374	4,737	—	11,481	—	49,592	3,754	638	3,678	5,463	745	14,278	35,314	.91514	32,317
3	12,689	3,220	—	11,481	—	27,390	1,972	536	3,564	2,269	745	9,086	18,304	.86261	15,789
4	10,835	—	—	—	—	10,835	1,811	87	1,132	1,555	—	4,585	6,250	.81309	5,082
5	1,500	323	—	—	—	1,823	431	126	1,132	849	—	2,538	(715)	.76642	(548)
6	1,500	5,819	—	—	—	7,319	431	1,585	1,132	1,636	—	4,784	2,535	.72242	1,831
TOTAL	79,114	24,579	1,200	34,443	43,622	182,958	12,063	3,930	15,648	16,199	2,235	50,075	132,883		123,592

NOTE: Explanatory notes, indicated on the schedule by letter, appear on the following attached sheets.

Exhibit R-39

Footnotes and Sources to Appendix A

(a) As reported in Mason testimony, NHI-58, Appendix A. The 5th and 6th year's receipts and expenses are lumped together in Mason's appendix but allocated evenly to the two years in the above table. Expenses in years one and two include $260,000 ($130,000 each year) of liquidation expenses as per Thompson testimony, Tr. 23535-36 (1/26/67).

(b) As reported in the "second" McCann appraisal, NHI-51. The appraisal includes an itemization of receipts and expenses, for each parcel appraised, except for certain expenses, which are almost exclusively real estate department costs and are allocated evenly over the appraisal period. The appraisal also shows for each parcel the "marketing time". I have treated the itemized receipts and expenses for each parcel as occurring in the final year of the "marketing period" shown in the appraisal, although I believe the appraisal may be read as indicating that the sales may take place at an earlier date. The assumption I have made *increases* the effect of the discount, and *reduces* the present value of projected net liquidation value.

(c) These "other real estate receipts" are reported in the Thompson Exhibit, NHI-45, p. 32.

(d) The "Road Property Other Than Real Estate" receipt totals are derived in the following manner:

Road & Miscellaneous Physical Property Account —NHI-42, pp. 12, 13		$150,789,400
Less: Appraisal Value of Real Estate —NHI-45, p. 29		113,706,700
		$ 37,082,700
Less: Adjustments from ICC Decision (Mimeo) Nov. 21, 1967, pp. 37, 39-41:		
Ties	$ 778,000	
Rails	1,270,000	
Misc. Track Material	358,000	
Bridge Removal	354,000	2,640,000
		$ 34,442,700

—Allocated to years 1-3 on basis of Gordon's prepared testimony (NHI-41, p. 11, see also NHI-42, pp. 37 et seq.) Although this allocation differs from the treatment which Mr. Gordon described on cross-examination as the treatment he had used for these assets and the equipment assets which I

have included in the column "Other Assets Less Assets Retained". (Tr. 23419.20). Penn-Central apparently used the method I have employed. NHI-93, p. 39.

(d) Expense totals as per Gordon Exhibit, NHI-42, pp. 37, 38, 45. Notice costs subsequent to 3rd year are allocated evenly to remaining years. This agrees with the method of allocation used by Penn-Central, NHI-39, p. 39.

(e) These are the assets itemized in the Gordon testimony, NHI-42, pp. 1-11, 13, 34-36, adjusted as follows (in 000's of dollars):

Current Assets		$ 18,438	
Special Funds		13,199	
Investments		20,389	
Equipment	$ 22,652		
Less:	3,500	19,152	—Reduction per ICC Decision (Mimeo), Nov. 21, 1967, p. 48.
Other Assets and Deferred Charges		4,823	
Total		$ 76,001	
Less: Value of Retained Assets		32,379	—Per ICC Decision (Mimeo) Nov. 21, 1967, p. 25. Breakdown provided in Chase Manhattan Brief to the ICC, p. 18 (Filed June 5, 1967)
Total		$ 43,622	

The receipts are assumed to be received in the first year in view of the nature of the assets and NHI-42, p. 40. This apparently agrees with Penn-Central's method, NHI-93, pp. 39-41, although Mr. Gordon apparently used a different method as to the equipment. (Tr. 23419-20)

(f) The total of $16,199,298 for "Accrued Real Estate Taxes" is derived from the amount reported by Gordon of $17,449,145 (NHI-41, p. 11) Less: Reduction by Commission of $1,249,847 (I.C.C. Decision (Mimeo), p. 29). The accrued taxes are allocated by year on the basis of the appraised value of the real estate sold in each year as a percentage of the total amount of real estate sold (see NHI-41, p. 11). It should also be noted

that the full appraised value of $11,177,633 for real estate valued by Mason (NHI-58, p. 13) is included in the 5th and 6th years in order to establish the appropriate timing of the taxes to be paid. This appears to agree with the method used in NHI-93, p. 39.

(g) As reported per Gordon testimony, NHI-42, p. 44. The $2.235 million total is allocated evenly to years 1-3. Alternatively, the total amount could have been assumed to be paid after one and one-half years as postulated in NHI-41, p. 11. In the latter case the *discounted value* of these taxes (and of the net receipts) would be some $2,383 *lower* than the amounts appearing in the table.

• The discount rate utilized is 6% per annum. Since the cash flows are assumed to accrue at mid-year (per Gordon testimony, Tr. 23419), a 3% rate is used and the number of periods being discounted is adjusted to reflect the mid-year flows, e.g. the first year's flow is assumed to occur after six months and the 6% per annum rate is therefore a 3% semi-annual rate.

Exhibit R-43

A Summary of Estimated Costs of Temporary Cessation of Operations With, No Liquidation of Properties Introduced by New Haven Trustee's Witness Smith

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

LIQUIDATION OF PROPERTIES

	FIRST YEAR	SECOND YEAR	THIRD YEAR
EXECUTIVE			
Trustees' Office	$ 64,733	$ 64,733	$ 64,733
Secretary	53,637	53,637	53,637
Vice President—Planning and Research	58,537	58,537	58,537
Treasurer	35,773	24,767	24,767
OPERATING—TRANSPORTATION			
Personnel—Other Than Train	64,723	—	—
Train Costs	55,856	—	—
Detour Costs	19,200	—	—
Per Diem	76,142	—	—
MECHANICAL			
Labor and Material			
Operation Support	5,477	—	—
Lay-Up of Locomotives	21,100	—	—
Lay-Up of Cars	6,630	—	—
Lay-Up of Marine Equipment	2,064	—	—
Heating and Power Plants	273,024	—	—
ENGINEERING			
General Office Building	48,165		
Operation Support	71,047		
Work Equipment Storage	8,006		
Secure Buildings and Facilities	175,000		

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY (Cont'd)

	FIRST YEAR	SECOND YEAR	THIRD YEAR
LEGAL	$1,000,000	$1,000,000	$1,000,000
PROTECTION	1,250,000	1,250,000	1,250,000
ACCOUNTING			
Personnel	526,047	97,553	97,553
Machines	150,000	—	—
PURCHASES SALES AND STORES	81,855	37,019	37,019
OTHER			
Insurance	8,645	—	—
Labor Relations & Personnel	11,272	—	—
Freight Traffic	16,710	—	—
(A) FRINGES Payroll Tax, H&W, Vac., Hol. (25% of Labor Costs)	656,424	425,632	425,632
(B) Supplies, Expenses, Rents, Etc. (10%)	199,871	107,554	107,554
	$4,939,932	$3,119,432	$3,119,432

(A)—Standard fringe percentage based on G.M.A. per cents and applied against labor portion of listed costs.

(B)—This 10% factor was not applied to transportation costs (other than personnel), heating and power plants, accounting machines, and protection since these items were either material or all-inclusive costs.

Planning and Research Dept.
New Haven, Ct.
September 18, 1968

Exhibit R-43

Excerpts From Transcript of Hearings Before the Commission's Examiner, Commencing October 7, 1968

(The "Remand Hearings")

Cross-Examination of Richard Joyce Smith, Witness for the New Haven Trustees

[28670] • • •

Cross Examination by Mr. Pollack:

Q. Mr. Smith, referring to Page 7 of R-1, at the very top of that page you referred to studies, quote, made of the cost of protection of the property.

When were those studies made, sir? A. Well, I think that they were made initially in connection with our liquidation study of several years ago and I think that they were reconsidered by our [28671] staff in accordance with my request in the preparation of my testimony.

Q. Do you have with you a study of the cost of protection of the property? A. I haven't the—

Mr. Auerbach: Mr. Examiner, that's the one I have already handed to him.

Mr. Pollack: If that's it, we will get to it, Mr. Auerbach.

A. I say I have the summary with me but I don't have that detail.

Q. Is it your understanding, Mr. Smith, that the document entitled, summary-estimated cost of temporary cessation of operations with no liquidation of properties, dated September 18, 1968, which Mr. Auerbach has agreed to furnish for the record, is or consists of the studies of the cost of protection of the property which you referred to in your prepared testimony? A. I certainly think it does.

Excerpts From Transcript

Q. In the middle of Page 7 of your prepared testimony, you referred to certain aggregate figures, namely 6.3-million during the first year, 4.6-million during the second year and 4.5-million during the third year.

Were those figures derived from a study made at your direction? [28672] A. They were.

Q. When was that study made? A. That was made sometime in—as referred to in there, it was—I don't know how far, what they used or what they had already done in the past because this has been a matter which has been in our minds for some time but certainly it was brought together in the late summer of this year and early September.

Q. And I take it that the studies referred to in your last answer are studies other than the September 18, 1968, document which Mr. Auerbach has undertaken to furnish to the record? A. Whatever the departments involved had to take into consideration in reaching the estimate on protection which is included in the summary.

Q. They are included in this summary that we have been referring to— A. The estimate of protection in the summary to which I have referred is $1,250,000 for each of three years for protection and that figure, I assume, is a figure very carefully determined by the use of all available data which the affected departments had at their disposal.

Q. Is it your understanding that that $1,250,000 cost of protection is related to your statement at the bottom [28673] of page 6 and the protection mentioned on that page?

Mr. Auerbach: Mr. Examiner, counsel referred to the bottom of page 6.

Mr. Pollack: I will rephrase the question.

By Mr. Pollack:

Q. Is it your understanding, Mr. Smith, that the $1,250,000 is a cost of protection against fire, vandalism, theft, deterioriation from the elements and similar adverse effect which you referred to at the very bottom of page 6 of your prepared testimony? A. No. You have referred to the estimate of—the total cost of $10-million, approximately $10-million when you first started asking me questions which relates to the cost of protection for a mothballing of the Railroad for a temporary period.

At the bottom of page 6 I say even if the bulk of the property ends up being sold as scrap, it will be necessary to protect it against fire, vandalism, theft, deterioration of the elements and so forth.

Now, in that situation if you are talking now about the cost of protection, if it is determined as of January 1st that this road is to be sold in liquidation, sold, liquidated, then, of course, the cost goes down very considerably and our estimate for that—for the three years for protection is 245,319.

[28674] Mr. Auerbach: Each year?

The Witness: Each year. Each of three years.

Q. Just so I can get that straight, Mr. Smith, your estimate of the cost of protection in the event that a liquidation is being actually carried out is approximate $245,300 a year? A. Yes, sir.

Q. And your estimate of the costs of protection in the event that there is a cessation of operation but a liquidation is not being carried out is the $1,250,000 per year; is that right? A. That's correct.

Excerpts From Transcript

Q. Mr. Smith, in your testimony referring to the middle of page 7, the sentence begins on the assumption that rather than an immediate institution of dismantling, close quotes.

Was that an assumption that you made in requesting the study we have been referred to as the September 18, 1968, summary? A. I requested that there be made a study of the cost to keep this Railroad in moth balls for any period after we had to close down because we ran out of cash and it was on that basis that the studies were made for that purpose as distinguished from selling a railroad in liquidation.

[28675] Q. You refer to the possibility of the conveyance of operating property and equipment to one or more other raliroads.

Is it your assumption that possible conveyances of that type would result in a greater recovery for the estate than conveyances of a different kind and nature?

Mr. Auerbach: Mr. Examiner, I don't know the purpose of this question. It seems to me this goes to issues that aren't involved here, and I object.

Exam. Clerman: The objection is sustained.

Q. Could you tell me, Mr. Smith, if you look at the copy of the document we have been referring to as the September 18, 1968, summary, again, is the document that Mr. Auerbach has agreed to furnish for the record, whether there are any payments indicated in your plan of estimated costs for either interest or principle on equipment obligations? A. No.

• • • • •

Excerpts From Transcript

[28680] • • •

Cross Examination by Mr. Pollack (resumed):

Q. Mr. Smith, as I understand it, you described your request of the New Haven staff for this study of September 18, 1968, which we have been referring to all morning, and which Mr. Auerbach will furnish for the record as a request for the costs of quote "mothballing the fleet"; is that correct? A. Yes, sir.

Q. Can you tell me what you mean by those words quote "mothballing the fleet"? end quotes. A. Well, what I mean is keeping the road in shape for a period of time with the idea that it might be in part or entirely acquired by another railroad. In other words, [28681] to keep the operating equipment in shape so that it can be sold as operating equipment on the line.

Q. What did you have in mind when you say operating equipment and road? Do you mean road in the technical sense? A. I mean the operating equipment. All equipment that is used in the operation of a going railroad. And also, of course, maintenance of the roadbed, that is, at least keeping the rails available.

Q. Do you mean as well as the rails available, cars, the catenary electrical connections and the like? A. Oh, yes, of course.

Q. And so this study, September 18, 1968, contemplates the—some form of protection of the rails and road property and a mothballing and protection of the cars, both passenger and freight, is that correct? A. That is correct.

• • • • •

[28788] • • •

Exam. Clerman: I think we might have—leave that over for tomorrow, Mr. Perkins. I have read

the statements of the witnesses, read and considered the statements of the witnesses under your appellation Pricing Theory and the objection raised, and your response, and I am not persuaded that the testimony in Exhibits 29 through 33, that is, witnesses Simon through Witness Badger, in the order in which you set it up in your transmittal letter, do in fact relate to a new or different pricing theory and I do not think they are within the matters to which they do relate or within the scope of the further hearing and the motions to strike and not receive Exhibits 29 through 33 are granted.

(Intervenor's Exhibits Nos. 29-33 were rejected.)

[28796] • • •

Mr. Auerbach: May I identify for the record, Mr. Examiner, a statement containing two sheets entitled The New York, New Haven & Hartford Railroad Company, Summary, Estimated cost of temporary cessation of operations with no liquidation of properties. And containing at the bottom of the second page, Planning and Research Department, New Haven, Connecticut, September 18, 1968.

Exam. Clerman: It will be marked Exhibit R-43 for identification.

(Petitioner's Exhibit No. R-43, Witness Smith, was marked for identification.)

Mr. Auerbach: I offer it in evidence.

[28797] Mr. Bader: I renew the objection which I made yesterday, which you overruled at that time.

Exam. Clerman: Do you want to state your grounds briefly?

Mr. Bader: Yes, that it cannot be qualified through this witness under the circumstances in view of the fact that the witness had nothing to do with the preparation of these estimates.

Exam. Clerman: Mr. Auerbach, would you like to respond to that?

Mr. Auerbach: Yes, sir, I am perfectly prepared to produce personnel in respect to this exhibit but like all of these railroad exhibits, no one person is responsible, nor could he be. Actually, it goes to the Trustees' position as to what is required because whether or not Mr. Bader is right, this is on what the trustees are relying in making their plans.

And in any event, I will point out, I did not suggest the production of this. It has always been available for examination to everyone.

The reference to it appears in the Trustees' testimony and I will leave it entirely up to the Commission whether it wants this evidence.

Mr. Bader: If it is introduced for that purpose, sir, [28798] I will withdraw my objection.

Exam. Clerman: I am satisfied it is admissible and R-43 is received in evidence.

* * * * *

Cross-Examination of Arthur McCann, Witness for the New Haven Trustees

[28839] * * *

Cross-Examination by Mr. King:

* * * * *

Q. Mr. McCann, you in fact made two appraisals of the [28840] Harlem River and Oak Point yards, is that correct? A. Yes, it is.

Q. And the exhibit that I have just shown you, is that your first appraisal or your second appraisal of the yard? A. It is the second appraisal, sir.

Q. And what was the date of that appraisal? A. It was forwarded to the New Haven Railroad on December 21, 1966, but the evaluation was as of December 31, 1965.

Q. Was there a transmittal letter which covered the transmitting of that appraisal to the New Haven? A. Yes, sir. It was a letter of—transmittal letter outlining the assumptions that I made in making this evaluation.

Q. Was that a letter written by you? A. Yes, sir, it was.

Q. To whom was it addressed? A. The New York, New Haven and Hartford Railroad Company at its 54 Meadow Street, New Haven, Connecticut address.

Q. And you mentioned some assumptions? A. Yes.

Q. Who—were those your assumptions or assumptions [28841] that were given to you? A. Assumptions that were given to me.

Q. By whom were those assumptions given to you? A. Mr. Robert Bleakney of Sullivan & Worcester.

Q. Did you follow those assumptions in making your second appraisal of these yards? A. Yes, sir, I did.

Q. Could you please tell us what those assumptions were? A. That the New Haven Railroad had ceased to exist. That the tracks were to be removed. Power was to be shut off, there being no power and electricity in the yards, and I was to appraise the property as an industrial facility without any railroad service.

Q. You did not state as an assumption that you were to appraise this property as industrial property. Were you so instructed? A. I had to do it. That is the only way it could be appraised.

* * * * *

[28846] * * *

Q. Now, I would like to address your attention to your earlier appraisal of these two freight yards.

I show you copies of NHI 52 and 53 and ask you if those documents are your earlier appraisals of the Harlem River and Oak Point yards? A. NHI 52 is my appraisal of the Oak Point yard and NHI 53 is my appraisal of the Harlem River yard.

Q. What was the date of the earlier appraisal? A. They were made as of June 15, 1965.

Q. When were they delivered to the New Haven, if you know? A. I don't have a note on that but I think it was sometime [28847] in September or October of 1966.

Q. Were you furnished any similar list of assumptions with respect to your earlier appraisal? A. I was not furnished with any list of assumptions for my earlier appraisal.

Q. Did you make your own assumptions? A. I was employed to estimate the fair and reasonable market value of the property, which I did.

Q. And on that basis, what were your assumptions as to rail service with respect to your first appraisal? A. On examination and from my experience in the neighborhood, I assumed that the yard was being adequately and economically served in its entirety by the New Haven Railroad.

Q. Well, were you told at the time you made your first appraisal, of the purpose of the appraisal? A. No, sir.

Q. Well, was it your assumption, then, that this property would be sold as an operating railroad property? A. I didn't assume it was going to be sold at all.

Q. Well,— A. I had no idea what they were going to do.

Q. Was this an appraisal on the basis that it was an operating railroad property? [28848] A. Industrial railroad facility, yes, sir. Operating railroad and facilities for shippers and tenants to be served by the railroad.

Q. And in NHI 53, page 2, referring to the Harlem River yard, you state its frontage on the eastern Harlem River

together with its railroad facilities make it a unique industrial facility that could be well used by any heavy industrial concern. A. Yes, sir.

Q. Did you regard the rail facilities as a favorable aspect of the land in making your first appraisal? A. Most certainly.

Q. Did you attach any premium to your land values as a result of the existence of those rail facilities? A. It wasn't exactly a premium. What I did was to examine the sales of comparable properties, railroad properties, analyze the considerations paid for them, arriving at a square foot unit value, then weighing the value increments for such property, one against the other, to arrive at the unit value that I did in making any appraisal, which was in most part $2.50 a square foot and in one part, $3.

Q. Well, in reaching your unit values, did you find that the unit values tended to be higher for properties [28849] served by rail service than for properties that did not have those facilities available? A. Well, in the borough of the Bronx, I know there is a differential of 10 per cent. Railroad facilities will add about 10 per cent to the value of industrial land.

Q. When you are talking about railroad facilities, are you talking about the conventional side track arrangements? A. Yes, sir.

Q. You are not talking about the situation where the shipper is required to do the switching and classification of his own cars, are you? A. I don't know anything about that.

Q. You didn't assume that these shippers within these properties would have to buy land in order to get their shipments to a rail head, did you? A. Well, no, sir. They had leases. They rented properties that the lines are in.

They are being served at the present time. Thy don't do anything but receive the goods and ship them out.

Q. And that was your assumption in making your first appraisal? A. Yes, sir.

Q. How did you go about appraising the improvements which [28850] were on the Harlem River and Oak Point yard land in your first appraisal? A. In examining and inspecting the building, I used my experience and allocated a square foot value to the buildings and then checked that out with whatever reasonable rents were being paid for them—the properties and capitalizing the net rent.

Q. With respect to the right of way between Harlem River and Oak Point and again from Oak Point north, when you made your first appraisal, did you appraise this right of way? A. No, sir, I did not.

Q. So that your only appraisal of the right of way was in connection with your second appraisal? A. That is correct.

Q. Now, when you went to make your second appraisal, is it true that in some cases you reduced the value of some of the buildings located on these two freight yards? A. Yes, sir, I did.

Q. And would the REA building in the Harlem River yard be an example of that? A. The REA building, the Becker-Singer Warehouse in the Oak Point yard, and the Idaho Potato building in the Oak Point yard.

[28851] Q. Would it be correct that you reduced your evaluation of the REA building from 675,000 in your first appraisal to 400,000 dollars in your second appraisal? A. That is the amount I reduced it to, yes, sir.

Q. Would you tell us the basis upon which you reduced that value in your second appraisal? A. The REA building was a special building built for the American Railway

Express Company with four tracks running through the center of the building. Without a railroad, the floor would have to be reconstructed. You would rent it to an entirely different class of warehouse. You would have a much lesser rental value than the railroad siding property that existed in the first appraisal.

Q. In the case of the Becker-Singer warehouse which you mentioned in the Oak Point yard, is it correct that you reduced your appraisal from one million dollars in the first appraisal to $750,000 in your second appraisal? A. I did, yes.

Q. Was that on a similar basis? A. Yes, sir. It was a warehouse that would only be able to be rented for a lesser figure without rail than with rail.

Q. I take it the same would be true of the Idaho Potato [28852] Warehouse— A. To a small extent, yes.

Q. Were there also some buildings which you gave some value in your first appraisal but gave no value in your second appraisal? A. Yes. On the first appraisal there were numerous buildings, small, wood, metal, brick buildings that were employed by the railroad for various railroad uses, which would add no value to the value of the land if the railroad ceased to exist.

Q. If the railroad ceased to exist, would those buildings, in your opinion, have to be demolished? A. Yes, sir, they would.

Q. So in fact they would probably be a liability? A. To a certain extent they would.

Q. You are speaking now of yard buildings and loading platforms and that type of building? A. Yes, north and the south platform and the old auction house and the produce warehouse. Various buildings for superintendents and switchmen in the Harlem River yard and the marine ter-

minal building which are old, wood, and metal buildings, and the same in the Oak Point yard, where you had a number of old wood, metal and stucco buildings used by the railroad for repairs of [28853] certain cars and diesel engines.

Q. With respect to easements, is it correct that in your second appraisal, you reduced your land valuation for certain easements in the Harlem River yard? A. I did, sir.

Q. And that you did not reduce the land values in your first appraisal for those easements? A. That is correct.

Q. Is it correct that all of those easements relate only to the Harlem River yard? A. That is correct.

Q. And that the total reduction on account of those easements is $184,600? A. That is correct.

Q. What easements were you referring to and what was the basis for the reduction? A. The easements were the easements to the City of New York for the Willis Avenue bridge, the Triboro Bridge, and the easement for the bridge of the New York Connecting Railway.

The Willis Avenue bridge cuts diagonally across the property. The Triboro Bridge and the New York Connecting Bridge cuts directly across the property.

To an industrial owner, without railroad facilities, [28854] the land under these structures would have less value than if it was not encumbered with the structures.

Q. I take it in not reducing your values for easements in the first appraisal, it was your judgment that these easements did not interfere with the present railroad useage of the land? A. That is correct. The railroad could have used the land under the structures to good advantage where a private concern could not.

Q. Is it also correct that you reduced your land values between your first and your second appraisal? A. That is correct.

Q. Is it correct that with respect to the Harlem River yards, you reduced your land values by 20 cents per square foot? A. That is correct, Mr. King.

Q. And with respect to the Oak Point yard, that you reduced your land values by 50 cents per square foot? A. Yes, sir, that is correct.

Q. What was the basis upon which you reduced the land values in your second appraisal? A. Because there was no railroad facilities connected with the properties and therefore they had a lesser value.

[28855] Q. Was there a parcel in the Oak Point yard which you appraised in connection with your second appraisal but did not appraise in connection with your first appraisal? A. I don't understand the question.

Q. Well, in your— A. I appraised everything in the second appraisal that I appraised in the first appraisal as far as the yards are concerned.

Q. Well, with reference to NHI 51, your later appraisal, you referred to a parcel 3A and a parcel 3B. A. Yes, Mr. King.

3B is the Oak Point freight yard which I previously appraised and 3A is the actual right of way extending across the northerly part of the yard.

Q. And the right of way, parcel 3A, you did not appraise in connection with your first appraisal? A. No, that is not part of the yard. It is the right of way.

Q. Now, at the time that you prepared your two appraisals, were you aware of a proposed sale in the Oak Point yard to an Abraham Rodolitz? A. No, sir, I was not.

Q. Were you aware that—at the time of your second [28856] appraisal, that the sale of a parcel in the Oak Point yard had been proposed? A. I don't believe I was.

Q. For purposes of refreshing your recollection, Mr.

McCann, I show you what has been marked in this proceeding as NHI 55, an appraisal dated November 8, 1965.

I ask you to examine that document. A. This is the appraisal I made of the part of the Oak Point yard.

Q. What is the date of that appraisal? A. November 8, 1965.

Q. So that appraisal was tranmitted prior to December of 1966, when you delivered your second appraisal to the New Haven Railroad, is that correct? A. Yes, sir.

Q. Do you recall what assumptions you made at the time of your second appraisal concerning the Rodolitz sale, did you take that into account in your second appraisal? A. Did I take what into account, sir?

Q. The proposal of that sale in the Oak Point yard in making your appraisal of the Oak Point yard? A. No, sir, I did not.

Mr. Auerbach: Mr. Examiner, just for clarification, [28857] I don't object to the question, but I don't understand the indefinite articles used in the question.

Is the question whether NHI 55 and the content of that taken into consideration where he transmitted NHI 51, is that the question?

Mr. King: Yes, that is the question, Mr. Auerbach.

Exam. Clerman: Your answer was, Mr. McCann?

A. I didn't take it into consideration.

• • • • •

Q. Mr. McCann, do you know if that Rodolitz sale has subsequently been consummated? A. I do not know.

Mr. King: May I ask Mr. Auerbach whether that sale has been consummated?

Mr. Auerbach: Yes, it has.

* * * * *

[28862] * * *

Cross Examination by Mr. Kernan:

Q. Mr. McCann, am I correct in understanding that the difference between your earlier appraisals, that is, NHI 52 and 53, and the later appraisal, NHI-51, is that the second appraisal assumed that there would be no railroad service available to either the Oak Point or Harlem River yard areas once the New Haven ceased operations?

Mr. King: Mr. Examiner, may I have a continuing objection on the grounds that I have stated?

Exam. Clerman: The objection is in the record. You may answer.

A. Yes, that is correct.

Q. To be more specific, Mr. McCann, that is that the second appraisal assumed not only that the New Haven ceased operations but also that no other railroad service would be available to these yards; is that correct? A. That's what I assumed, yes.

Q. Mr. McCann, you have testified that when you say [28863] a piece of industrial—that with respect to a piece of industrial property, railroad service is available, that means that a siding can be supplied; is that correct? What do you mean by when you say railroad service is available? A. Meaning that a siding could be provided for the use of any occupant in any part of the yard.

Q. Who normally pays for the cost of the siding, the ground under the siding and the cost of the siding when an industrial user has a siding?

Exam. Clerman: That's beyond the scope of our limited inquiry here. Will you proceed to your next question, sir.

Q. I would ask you to assume for purposes of my next question that rail services were available to the areas which are now the Oak Point and Harlem River yards of the New Haven at the Port Morris branch of the New York Central, without passing on the accuracy of that assumption.

Assuming rail services, would you appraise the Oak Point and Harlem River yards as of December 31, 1965, at the same values as are shown, the same values as are shown in your earlier appraisals as of June 15, 1965? A. If the same services as provided by the New Haven [28864] Railroad could be provided by somebody else, my values would be exactly the same in the second appraisal as it was in the first appraisal, with the exception of the lessening in the value because of the probable—because of the—the lessening in value in the amount of those figures that I placed on the yard buildings in both of the yards because probably nobody else would have any value.

The building would have no advantage to nobody else but the New Haven Railroad, so it would be the same with the exception of the reduction of those yard buildings. If the service was the same as it was before.

Q. Turning to your appraisals, could you be more specific and state exactly which buildings you would write down, assuming rail service was supplied by other than the New Haven? A. In the Harlem River yard, there was miscellaneous yard buildings in the amount of $100,000. In the Oak Point yard there was miscellaneous yard buildings amounting to a value of $61,000.

Q. Those are the only write downs you would make under that assumption; is that correct? A. That's correct.

Q. You would not write down any of the other buildings, [28865] the warehouses, because of the rail facilities being available; is that correct? A. No, with the same service available, the properties would be worth the same as I estimated in my first appraisal.

Q. You would also, assuming—on the assumptions that I have given you, you would not make any write down in the land values of either the Harlem River or the Oak Point yards? A. No, sir.

Q. When you referred to the same rail service being available, do you mean that there would be a connection of a siding to a trunk carrier available? In other words, if there was a siding available to an industrial user, connecting with a trunk carrier, you would consider that the same rail service?

Mr. Auerbach: Mr. Examiner, if the witness can answer, I have no objection, but it seems to me he answered it when he says, the same.

Exam. Clerman: I agree with you.

* * * * *

[28869] * * *

Mr. Kernan: Mr. Examiner, I would like to make an offer of proof on the clearances. I think that that is vital to our position and you have ruled that the—sustained an objection to it. We think it's of extreme importance.

Exam. Clerman: No, I will not accept an offer of proof on cross examination.

* * * * *

Excerpts From Transcript

[28871] • • •

Mr. Kernan, I would respectfully like to renew my offer of proof on your sustaining of the objection to the question I asked Mr. McCann on clearances. I would like to state the offer of proof for the record, if I may, because we feel it is of vital significance to our case.

Exam. Clerman: An offer of proof—by an offer of proof, you would state on the record what the witness would have responded had you been permitted to ask the question, is that what you mean, sir?

Mr. Kernan: Yes, that's correct, sir.

Exam. Clerman: You know what the witness would have responded?

Mr. Kernan: I believe I do. As you know, we have previously met with counsel for the trustees and the witness and I asked the witness the question at that time and I know what he responded to me at that time.

Mr. King: I would object to Mr. Kernan stating what this witness allegedly told him out of the presence of the other parties. That part I would [28872] object to. If he is going to represent what Mr. McCann told him at a private hearing.

Exam. Clerman: I don't think the offer of proof in these circumstances is proper, sir. You had completed your examination, had you not? We will go on to Mr.—

• • • • •

[28876] Q. So is it—am I correct, is it your assumption here in NHI-51, in that particular item, that it is an equal expenditure in each year totalling $500,000? A. No,

it wouldn't be equal in each year because you would be liquidating the properties as you went along.

In the first year, your expenses would naturally be much greater than they would be in the fifth and sixth year, so most of these properties with the highest value would be liquidated in the first year. So I do believe that Mr. Thompson estimated that the greatest amount real estate department expenses would be expended in the first year or two.

Q. And would your answer be similar as to the next item on the same sheet; namely "quote Appraisal fees $25,000" close quote. A. Those are the fees that I estimated and told Mr. Thompson would be necessary in the liquidation of the railroad. If I was employed to appraise these properties during a six year period, that—these are the amounts that I would request from the railroad.

Q. And this amount, that is, $25,000, is your total over a six-year period? A. It is, yes.

Q. Did you make any assumptions as to how that would be [28877] spread over the six-year period? A. Not an assumption. It would be the appraisal is made as of the estimated liquidation date that I have in my appraisal.

Q. Is it your assumption, then, that the appraisal fee would be incurred just prior to the time the particular property would be sold, is that right? A. That is correct, sir.

• • • • •

[28881] • • •

Mr. Bader: At the time that he appraised the two yards for purposes of NHI 51, was he aware that there was a physical connection, an interchange between the Oak Point yard and the Port Morris branch of the New York Central?

Excerpts From Transcript

Exam. Clerman: You may answer.

The Witness: I was not aware of it, no, sir.

• • • • •

[28980] *By Examiner Clerman:*

In dealing with some of the exhibits of Penn Central, for example, I was rereading the comments on the record in [28981] support of these exhibits by counsel and I reread and reviewed some of these exhibits themselves and I find that in ruling on R-29, the testimony of Robert E. Simon, Jr., I have reconsidered this exhibit and I find although it relates largely to the discount rate on the proceeds of the sale of land, it also deals with some subject matter which may be construed as a pricing theory, which should be brought before the Commission, I believe.

I am therefore reversing myself on R-29 and receiving it in evidence subject to cross-examination of Mr. Simon.

I would like to be informed sometime this morning when Mr. Simon can be produced to testify.

(Intervenor's Exhibit R-29, Witness Simon, was received in evidence.)

• • • • •

Cross-Examination of Frederick E. Weaver, Witness for Penn Central

[29412] • • •

Cross Examination by Mr. Lane:

Q. Does that statement assume as its basis that Penn Central would not purchase any portion of the interchange track in the event the New Haven were to cease operations, sir? A. I can't speak for the Penn Central Railroad, but I can recommend that what we are talking about is highly hypothetical.

Mr. Lane: I move to strike the answer, Mr. Examiner, as not responsive to the question.

Exam. Clerman: You are asking the witness what he [29413] means by his statement.

Mr. Lane: I am asking him if there is an underlying assumption in his statement that in the event New Haven ceases operations, Penn Central would not purchase any additional track.

Exam. Clerman: I agree, you haven't answered. Do you understand the question?

The Witness: Yes.

A. That's correct.

Q. And did you not—do you have authority to make such a decision? A. No, sir.

Q. What is the character of traffic—strike that.

What is the principal destination of traffic moving from the Port Morris Line into Oak Point; do you know, sir? A. No. It is all New Haven traffic as far as we are concerned.

Q. You do not know where the New Haven picks it up from there—where it delivers it from Oak Point? A. No, I have made no study to that.

* * * * *

[29420] * * *

If Penn Central could derive sufficient revenues and profits from industries locating in the Harlem River Yard to justify the purchase of those tracks, would they in your opinion purchase those tracks? A. I think the Penn Central is not beyond taking a profit [29421] for the services they perform.

And I am quite sure if you can prove beyond a shadow of doubt with adequate information and accurate informa-

tion and not hypothetical assumptions that this is going to be generated, maybe that's a negotiable way of getting to it.

But I wouldn't recommend it on what I have right here.

Q. What do you have right here, Mr. Weaver? A. On the preponderance of the traffic being perishable.

Q. The preponderance of what traffic? A. That you are speaking right now.

Q. Present traffic or proposed traffic? A. Present traffic.

Q. Does your sentence refer to present traffic or proposed traffic, the sentence at the bottom of page 3, the top of page 4? A. I can only go by my assumptions on what you are doing now, not what you are proposing.

Q. Do you say, Mr. Weaver, that any shipper locating in the Harlem River or Oak Point Yards would have to purchase—would have to provide the track connection; do you see that on page 3? A. Yes, that's right. The obligation of our line haul [29422] rates stops at the boundary line.

The interchange track, which would be 149th Street and if you liquidate it and there was no rails there, we couldn't go beyond.

* * * * *

[29449] * * *

Cross Examination by Mr. Bader:

Q. Do your present duties or have any of your past duties involved any authority with respect to industrial development? A. Only on a recommended basis.

Q. In other words, you can make a recommendation? A. That is correct.

Q. Have you been shown any traffic studies for the Oak Point Harlem River yard area made by Penn-Central, or

by Penn or by New York Central? A. Well, only that relates to perishable traffic.

Q. Are you talking now about statistics on freight movements? A. Yes.

Q. The ones that Mr. Lane inquired about? A. I am talking about perishable traffic. I am alluding to that particularly. I have been shown and I have here a paper that I received from the office of the Director of Cost and Profit Analysis.

Q. When did you receive that, Mr. Weaver? A. After I received Mr. Shannon's testimony. I thought I better find out whether or not—just where the situation stood with respect to profitability of perishable traffic.

[29450] Q. You hadn't gotten that before you circulated your testimony, is that right? A. No, I did not.

You hadn't even gotten it until after you got Mr. Shannon's rebuttal testimony, is that right? A. That's right. I thought I better take a look and see where we would stand with respect to perishable traffic.

Q. Do you know the divisions on perishable traffic to Hunts Point between the New York Central and the New Haven? A. I do not but I have here—

Q. I want you to stick to my questions. A. All right.

Q. Have you made any study or have you seen any study of the number of cars of traffic that would be generated in that area if the both yards were used for industry? A. Yes, I have an item set here under a standard transportation commodity code and this relates to a draw-off of 1967 traffic—

Q. I am talking about the potential traffic. A. I have no study about potential traffic.

Q. You have no study of potential traffic out of Harlem River or out of Oak Point or into Harlem River or into

Oak Point, is that right? [29451] A. I have no study on such potentialities, no.

Q. Do you know how much Penn Central realizes in revenue on an average in 1968 out of traffic destined for Hunts Point? A. I have here—as I say, I started to tell you before, a draw-off of the 1967 traffic where ten or more cars came from a single origin city show.

Now, this I have received from the Director of Cost and Profit Analysis. I am sure that he could verify this piece of paper.

Q. When did you get it? A. 10-8-68.

Q. I am not interested in it.

Do you know the destination or did you know the destination of other traffic exchanged with the New Haven via Port Morris? A. No, sir.

Q. Are you familiar with the project that Mr. Rodolitz has under construction in the Oak Point yard area? A. You mean the expansion of the Hunts Point or the Oak Point?

Q. Oak Point, Mr. Weaver. A. No, sir.

* * * * *

[29453] * * *

Q. Is there any way to move traffic by rail to Hunts Point from Penn Central except over present New Haven lines? A. No, sir.

Q. Have you spoken to any official of the City of New York about their position on the cessation of rail service to Hunts Point? A. No, sir.

Q. Do you know how much that facility cost? Hunts Point? [29454] A. No.

* * * * *

You know, do you not, that the principal way to get material into that market is via rail? A. I couldn't fully agree with you on that.

Excerpts From Transcript

Q. Do you have any idea how many carloads a year Hunts Point market receives, rail cars? A. No, I would say it was probably somewhere around— [29455] I'd only be expressing a guess. No.

Q. You know it is in the order of 15 to 20 thousand a year, don't you? A. I was going to say that.

Q. And you know a substantial portion of that traffic if not the great bulk of it comes off Penn Central, don't you? A. I am not too sure of that either, that it all comes off the Penn Central, but I would express an opinion, yes.

Q. You know there is a considerable amount comes off Penn-Central, don't you? A. Yes.

Q. And it is well over ten thousand cars a year, isn't it, Mr. Weaver? A. Yes, I would say it is over ten thousand.

Q. And you know that that facility is expected to expand and has plans for expansion, don't you? A. Yes.

Q. Isn't it your opinion that if the New Haven closed down, the city would have to acquire access to rail service for Hunts Point?

Mr. King: Are you asking for his opinion on that?
Mr. Bader: Yes.

A. Someone would, I would say that. Whether it is the city or someone else. Someone would have to.

[29456] Q. I don't mean the City buying it. The City would have to make sure there was such service, wouldn't they? A. I would think so.

Q. The logical way to get that service in would be via Port Morris, wouldn't it? A. Logically.

Q. The only other options involve an incredibly roundabout movement, don't they? If you want to get to Hunts Point without going through Port Morris, what options do you have, Mr. Weaver? A. Piggyback.

Q. Of railroad cars? A. No. Well, railroad cars bring piggybacks in right now.

Q. I know that.

Do you know what percentage of their input to the Hunts Point market is piggyback? A. No, I do not.

Q. If you wanted to run rail service, as you agreed that you would want, that somebody would want it into Hunts Point and you didn't use Port Morris, what other options would be open to you, Mr. Weaver? A. First things first. I did not agree that I wanted to run rail service to Hunts Point yard.

[29457] I don't think I would recommend to the Penn-Central to do so right at this point, right now.

Q. Didn't you agree with me that the City of New York would have to make arrangements to get rail service into Hunts Point? A. I said the City of New York—I didn't say Penn-Central. Now you are saying I would want to do it.

Q. All right, I will accept that you don't want to do it. A. All right.

Q. Now the question I am asking you is, if you don't do it via the Port Morris branch, or the former Port Morris branch, what other options to get rail service to Hunts Point are available to you? A. None.

* * * * *

[29460] * * *

Q. Now, my question to you is this, sir, And it is predicated on the sentence that we read together out of page 4 of your testimony.

Do you think that it is likely that a developer faced with that conundrum that we have just described, namely, if he loses his rail service, he loses a lot of value, would sell off the gateway to this rail service without making—

without getting full value for it? A. I don't think he would.

Q. So then you think—your testimony is that that "if" sentence that I read to you in the middle of page 4, if the property immediately adjacent, et cetera, states a very unlikely possibility, is that correct? A. There is a possibility but I am saying that as far as the Penn-Central is concerned, and I am concerned with the Penn-Central, that I would not recommend that the Penn-Central be interested in purchasing that land to maintain the railroad in there so he can get his money.

This is what I am saying.

[29461] Q. Access to Hunts Point from Port Morris runs right straight through the Hunts Point yard, is that right? A. Right.

Q. The only way you can get there is to buy New Haven land? A. Who buy it?

Q. Is for somebody to buy, whoever wants to run service in there, right? A. Correct.

Q. Now, do you think that Penn-Central can give up all the Hunts Point market on your sole recommendation, sir? A. Oh, I will recommend that they do that on the basis that I don't think it's a profitable proposition for a capital investment of that size.

Q. You don't know how much money can be gotten out of that operation, do you, sir? A. That's right, and I don't think that I would put that much money in it for that kind of an investment.

Q. Do you know how much you would have to invest, sir? A. No, sir. On the appraisal it says 22 and a half million dollars.

Q. To buy a line through there? Is that what it says, it costs you 22 and a half million dollars to buy a line

through the point? [29462] A. That is the appraisal I read.

* * * * *

[29463] * * *

Examination of Charles C. Shannon,
Witness for the New Haven Bondholders

* * * * *

Direct Examination by Mr. Lane:

Q. Mr. Shannon, do you have any questions that you wish to make to your prepared testimony, R-16? A. Yes, sir.

Q. Could you indicate them? A. On page 4 near the bottom of the first full paragraph, strike "Spuyten Dyvil" and insert "Westchester Yard".

Going down to—

Exam. Clerman: One moment, please. Does that become [29464] Westchester Yard?

The Witness: To Westchester Yard.

A. The next sentence, take out the word "then". Strike "through Mott Haven, Melrose and Westchester Avenue" and after Port Morris, insert the word "interchange".

Q. Do you want to strike the word "yard" also after Westchester, Mr. Shannon? A. Yes.

Exam. Clerman: And after Port Morris?

The Witness: Add the word "interchange".

Q. Do you want to repeat the sentence in full the way it stand as corrected? A. It will then read:

"From my understanding of the Penn-Central practices and routes as described during the work paper examination,

these cars move into the New York City area for the most part on through Penn-Central trains from Selkirk or points west to Westchester Yard. They move by local switchers to Port Morris interchange."

On page 5, starting with the fifth line from the top, after "Oak Point", change the comma to a period, and then strike —semi-colon to a period, and then strike "It is estimated that between 90 per cent and 95 per cent of such receipts were" and then we will insert "1127 cars was traffic [29465] for Hunts Point including" and then we will continue the way it is written, "approximately five cars per day for the market arriving via the New York Connecting Railroad."

Exam. Clerman: You are changing arrived to arriving?

The Witness: Yes.

And then starting with "it appears" down through the part in parentheses of Charles E. Ragland, strike the entire amount of five lines.

Q. Did you wish to put in a substituted sentence there, Mr. Shannon? A. No.

Exam. Clerman: You want to leave the material in parentheses in, is that right?

The Witness: Everything after "it appears". Strike the material.

Exam. Clerman: Including the material in parentheses?

The Witness: Right.

A. The small correction on page 6, the last line, 80 should be changed to 50.

Excerpts From Transcript

Exam. Clerman: Are there more?
The Witness: No, that's all.
Mr. King: Mr. Examiner, may I examine?
Exam. Clerman: Yes, sir.

Cross-Examination by Mr. King:

[29466] Q. Mr. Shannon, while we are on corrections, on page 5, where you struck that sentence at the end of the paragraph—the top of the page? A. Yes, sir.

Q. I was given a correction the other day which apparently you have not made.

I would like to read the sentence which was substituted and ask you if it is a correct statement.

"For the first eight months of 1968, traffic to Hunts Point amounted to 9,933 cars which would indicate an annual volume of some 15,000 cars."

Is that a correct statement? A. That is a correct statement.

Q. On page 1 of your testimony you indicate that your background includes service on the New Haven as operating vice president.

During what period were you operating vice president on the New Haven? A. I came to the New Haven on January 15, 1958, as operating vice president.

Q. And how long did you hold that position? A. I was there until January 1, 1960.

Q. Does that include your service as executive vice president? [29467] A. Yes.

Q. When did you become executive vice president? A. Oh, I can't give you the exact date but it was probably about March or April of 1959.

Q. And could you give me a one or two sentence description of your duties as executive vice president of the New

Haven Railroad? A. As executive vice president of the New Haven I had general supervision over all of the departments of the New Haven Railroad, excluding law and real estate.

Q. Now, you state on the first page of your testimony that you quote "have studied the question of whether it would be feasible to provide railroad service to the areas now used as the Oak Point and Harlem River yards of the New Haven, both located in Bronx County if the New Haven were to terminate rail operations and sell these properties."

Does the paragraph which immediately follows that statement describe the extent of your study? A. Well, the study is based upon my knowledge of the New Haven and in the course of preparing my testimony, I again went to the property involved and looked it over.

Q. Well, you describe in that paragraph, do you not, a physical inspection of the property? [29468] A. Yes, sir.

Q. By a physical inspection, you mean one? A. More than one.

Q. You personally made more than one? A. I made one.

Q. And you mention together with another representative.

Is that the Mr. Storm who is mentioned below? A. Yes, sir.

Q. And he made two visits, is that correct? A. Yes, sir.

Q. Now, you also consulted, did you not, with New Haven operating personnel.

Are you referring to Keith Young and Al Sugallo of the New Haven? A. They were the two local supervisors we consulted.

Q. Who else in connection with the New Haven Railroad did you consult in this study? A. In the preparation of data we conferred via telephone with Mr. Finch.

Q. And Mr. Finch gave you data as to total cars received at Oak Point and cars forwarded at Oak Point, is that correct? A. Amongst other data.

Q. What other data did Mr. Finch furnish to you? [29469] A. He provided the information as to the traffic in and out of Hunts Point that you mentioned earlier.

He provided us with a list of industries, which has been provided you.

Q. And those lists are in terms of traffic volumes, is that correct? Not the list on the industries, obviously. The list of the traffic is in terms of traffic volume by number of cars? A. It is expressed in number of cars.

Q. There are no figures in the data given to you by Mr. Finch as to the profitability of the traffic from the New Haven standpoint, are there? A. No, sir.

Q. Do you have any profitability studies as part of this study you mention on page 1? A. No.

Q. You also mention in that paragraph on page 2, in describing your study, some engineering opinion and advice developed by Mr. Storm, is that correct? A. Yes, sir.

Q. Now, I'd like to read from page 2 and 3 of your work paper and ask you whether that is among the engineering advice and opinion that you referred to on page 2 of your testimony? [29470] A. Would you give me the work page number?

Q. Yes, page 2. I am referring to the memorandum of Mr. Storm dated September 17, 1968.

"As indicated on my sketch, attachment (B), the Port Morris branch of the PC is in a cut as it approaches east and passes underneath the New York Connecting Railroad with a grade differential of some 18-20 feet. The angle of crossing is slightly askewed from 90 degrees. An inter-

change track from the PC bears north in a sharp curve to run roughly parallel to the New York Connecting Railroad."

Mr. Lane: Mr. Examiner, I believe the sentence that Mr. King is reading says an interchange lead, rather than an interchange track.

Mr. King: I'm sorry. I will accept the correction.

Exam. Clerman: Do you know where to take up now?

"The interchange lead then continues north up a steep incline and connects with a New Haven track approximately at the south portal of the 149th Street bridge."

"The interchange track is in generally poor condition. The rail is worn. The ties are in poor condition and fastenings are generally loose. Line and grade are poor. The grade is unevenly distributed, being quite flat on the south end and then rising very steeply in a few hundred feet [29471] at the north end."

"The curvature coming out from beneath the New York Connecting Railroad Bridge is quite sharp (the point of curve is actually west of the bridge, the bridge having a wide throat to the east) without having measured, I would estimate it to be an 18 degree to 20 degree curve"—

And again skipping—

"There is a total grade difference of approximately 18 feet to 20 feet to overcome in this connecting track.

"The controlling grade at the north end could be alleviated by regrading the entire track and switching further to the east.

"While there is some industry located on a siding parallel to the interchange lead, it would appear that the interchange lead could be moved approximately 30 feet to the

east which would also alleviate the sharp curve at the south end."

Unquote.

Is that among the engineering advice and opinion given to you by Mr. Storm?

A. It is part of it, yes, sir.

Q. Are you familiar with that industry to the east of the interchange track? A. Not particularly.

[29472] Q. Do you know of a long term least to Weyerhaueser? A. No, I don't.

Q. Now, your testimony was submitted in rebuttal to the testimony of Mr. Weaver, is that correct? A. Yes, sir.

Q. On page 4 of Mr. Weaver's testimony, he says that Penn Central does not have yard facilities to perform the switching and classification service for industries located in the Oak Point and Harlem River yard areas.

Are you taking issue with that portion of Mr. Weaver's testimony? A. I am not taking issue with the lack of yard capacity in the particular area.

Q. Well, I take it you agree with Mr. Weaver when he says that Penn Central is unable to perform the switching and classification service at the Port Morris yard? A. Yes.

Q. And I take it that you agree with Mr. Weaver that the Westchester Avenue yard is presently too congested to perform this service? A. Presently.

Exam. Clerman: Is that yes?

The Witness: Yes, Presently.

* * * * *

[29479] * * *

Q. Where is Penn Central on its Port Morris branch going to handle those fourteen switch crews daily? A. It will not require fourteen switch crews daily.

Q. Well, you are talking about expanded traffic, are you not, Mr. Shannon? A. That's correct.

Q. Do you mean, then, by your statement that it will be in addition to fourteen switch crews daily? A. I would expect they would operate with less than fourteen switch crews daily.

Q. In other words, the New Haven is presently inefficiently operating the area? A. No, with Penn Central operation in there, they will utilize Selkirk yard for advanced classification for traffic for Oak Point and Hunts Point yard and avoid the expensive switching situation that exists at Oak Point.

Q. You used the term, advanced classification. Is that synonymous with the term on page 11 of your testimony, pre-blocking? A. Yes, sir.

Q. You are not merely talking about setting cars up on the headend of a train designated for the Harlem River area, are you? [29480] A. No, sir.

Q. You are talking about customer classification? A. Yes, sir.

Q. What is the distance between the Selkirk yard and Port Morris, Mr. Shannon? A. Several hundred miles.

Q. Have you consulted with anyone at Penn Central concerning the capacity of the—the present capacity and planned capacity of the Alfred E. Perlman yard? A. The source of my information is the testimony of the Penn Central as to what they were going to do with the Perlman yard and it was one of the major points in securing the merger in the Penn Central.

Mr. Patchell testified at great lengths as to how he was going to be able to classify at what is now the Alfred E. Perlman yard so that cars could be delivered to the consignees' door.

Q. You are talking about Mr. Patchell's testimony in this record? A. In the New York Central-Penn merger. I don't know whether that's the same docket or not.

• • • • • •

[29481] • • •

A. This very point of the advantages of Selkirk yard, which is now the Alfred E. Perlman yard, and its advantages in pre-blocking traffic for customers was picked up and included in the ICC report authorizing the merger of the Penn Central.

• • • • • •

[29643] • • •

Q. Specifically, Mr. Shannon, what testimony of Mr. Patchell were you referring to? A. I am referring to Mr. Patchell's prepared statement and my copies marked S-9 and I am referring to the last paragraph on page 39.

[29644] • • •

Q. Mr. Shannon, you are referring—did you refer to S-9, sir? A. Mine is marked S-9.

Q. Do you know the date of that exhibit? A. The best I can tell, mine is undated.

Q. Do you know when approximately that testimony would have been given? A. I understand it was marked as S-9 on November 6, 1962.

Q. And you assumed then, I guess, that it was prepared prior to then by Mr. Patchell? A. I would presume so.

Q. Now, Mr. Shannon, would you please read the paragraph on page 39 that you make reference to. A. "The increased volume of traffic of the merged company moving through Selkirk will be classified for direct delivery virtually to the customer's door in New York City, Northern New Jersey and New England territories. This will be particularly true of traffic for the New [29645] York

City—New Jersey area where railroad operating facilities are unsatisfactory and transportation costs exorbitant.

Proper classifying of traffic for these areas will eliminate costly delays in transfers and other rehandling prior to delivery and permit substantial operating savings and retirements."

The paragraph continues with what they are going to do with westbound traffic, which I don't think you are interested in.

Q. Could you indicate the page of the Commission report to which you had reference yesterday? A. I am referring to page 122 of F D number 21989, which was—is dated April 6, 1966.

Q. Are you referring then to the Hearing Examiner's report? A. Yes, sir.

Q. Did you have any other reference in mind, Mr. Shannon, other than those two you have given? A. They were the two important ones, where the problem was so specifically spelled out. The situation of the benefits of Selkirk is all through the record of the merger case of Penn Central.

Q. Have you had any conversation with Mr. Patchell [29646] concerning what he meant by the statement you referred to on page 39 of S-9? A. No, sir.

• • • • •

Q. Mr. Shannon, have you had any conversation with Mr. Patchell as to whether his prediction in 1962 has been realized in 1968? A. It would be impossible. Mr. Patchell is no longer an employee. I don't even know where he is.

Q. I take it the answer is you haven't spoken with him? A. I have not spoken to Patchell.

Q. Have you consulted—strike that, please.

[29647] Do you understand that the Alfred E. Perlman Yard, which was recently opened, is a facility which was built for purposes of the anticipated increased traffic as a result of the Penn Central merger? A. My understanding is that that was the purpose of the yard and because of the increased traffic, there is greater potential to block traffic for destination and that's the reason it was designed this way.

Q. I take it then you have not read the testimony of Mr. Schofield in this record? A. I have not.

Q. If Mr. Schofield had testified in this proceeding that the Alfred E. Perlman yard was constructed as a New York Central facility and not to handle increased volumes of traffic generating from the merger, would you change your testimony concerning the capabilities of the yard?

Mr. Bader: I have to object to that question as to form. I also think any reliance on Mr. Schofield's testimony that didn't reflect his cross-examination would be very far misplaced.

Exam. Clerman: You may answer, sir.

• • • • •

[29648] • • •

A. I would question Mr. Schofield's testimony.

Q. Upon what basis, Mr. Shannon? A. I think the most recent publication I have seen is the News release, which is quoted in Traffic World of April 28, 1968, which refers to the fact that this yard is to handle the combined traffic of Penn Central.

[29649] Q. Do you know what combined traffic that news release is talking about, Mr. Shannon? A. I would presume it is related to the fact that they are going to com-

bine the traffic roughly between the Atlantic Coast and the Chicago-St. Louis area and move it over the New York Central route.

Q. May I see the news release to which you have reference? A. Yes.

Q. Perhaps, I could look at this after and not waste the time of counsel, Mr. Examiner.

Turning to the Hunts Point Market, Mr. Shannon, what was your assumption or what is your assumption as to how the switching and classification of that market will be performed in the event the New Haven were to liquidate? A. It would depend upon what means is arrived at to serve the area. If Penn-Central will continue to bring their cars in and serve the area then in my view the primary classification will be done at Selkirk.

Q. And you are talking about classification to the customer's door; is that correct? A. In accordance with Mr. Patchell's testimony.

* * * * *

[29660] * * *

Q. Mr. Shannon, Mr. Weaver states in his testimony at page 5 that the entire former Port Morris branch, as well as Penn Central's main line on Hudson Division south of Tarrytown, New York, and its Harlem branch is subject to clearance restrictions as to height and width of cars.

Do you agree with that statement? A. I could not understand exactly what the restrictions were in Mr. Weaver's testimony, so I have no opinion whether it is a matter of great importance or not.

Q. On page 9 of your testimony, you stated that in reviewing Mr. Weaver's testimony and work papers, you were unable to determine the minimum clearance on the

Port Morris branch or on Penn-Central's main line to Albany or the location of the points of restriction.

Is that correct? [29661] A. Yes, sir.

Q. What documents were contained in Mr. Weaver's work papers giving information as to clearance restrictions? A. There was included some charts for the Port Morris branch.

Q. Were you not also given a list of the clearances on the former Port Morris branch by height of car and width of load? A. No.

Q. I show you a document and ask you if you were shown that document as part of Mr. Weaver's work papers? A. I have never seen it.

Q. Did you examine those clearance diagrams which were furnished to you? A. Mr. Storm, my assistant, did.

Q. What do you understand that the clearances designated on those clearance diagrams are? A. I presume it is a means of trying to show the restrictions.

Q. Well, do you know how those clearance diagrams are prepared? A. In a very general way.

Q. Well, they are prepared, are they not, by use of a scope car? [29662] A. It is my understanding.

Q. And they measure, do they not, the opening through which the rail cars must pass? A. Yes.

Q. And they do not make any provision, do they, for a safety factor? A. I don't believe so.

Q. Do you know what the normal safety factor is on clearances on railroads? A. Depends upon the speed of the operation.

Q. Would you accept a figure of 4 inches as reasonable? A. At what speed?

Q. At any speed. A. No, sir.

Q. You would not? A. I would not.

Q. What is the figure you would accept? A. If you were on a main line operating at substantial speed, the four inches might be a reasonable figure. If you were operating in yard territory such as the Port Morris branch, where you could operate very low speeds under particular restriction, you could operate with a margin of safety a lot less than four inches.

Q. What do you mean by a lot less? [29663] A. One or two,

Q. What could cause vertical oscillation of rail cars goings through clearances? A. Condition of traffic.

Q. Rough joints? A. Could be.

Q. Wheel alignment? A. No.

Q. What causes lateral oscillation of cars going through restrictions? A. Could be track or could be a track condition.

Q. Could it also be the curvature of the track? A. Yes.

Q. Did you make any investigation of the clearances on the Port Morris branch? A. Nothing other than the workpapers of Mr. Weaver.

Q. Do you know the nature of the clearance obstructions on the Port Morris branch? A. Generally I understand they are related to one bridge and the tunnel through St. Mary's cemetery.

Q. You understand they relate to only one bridge? A. The most restrictive.

Q. Are you talking about most restrictive both ways? A. Yes.

[29664] Q. So it is your understanding that the most restrictive point is the same whether you are going eastbound or westbound, is that correct? A. No, sir.

Q. What is your understanding? A. I understand there are different restrictions on the two tracks.

Q. Don't those restrictions all arise from overhead bridges? A. Oh, I think so, yes.

Q. And don't those overhead bridges principally support public streets? A. Yes.

Q. And are they not made of steel and reinforced concrete? A. I think so.

Q. Have you made any investigation as to whether the track under the bridges could be lowered? A. We were—we did not have access to the property.

Q. Did you ask for access to the property? A. I did not.

Q. Did you make any investigation on the clearance restrictions between Spuyten Duyvil and the Melrose yard? A. That information was not available to us.

Q. Were you given the timetable of Penn-Central? [29665] A. We were given the sheets out of the back of the timetable.

Q. You were given the sheets you asked, is that correct? A. Yes, sir.

Q. Would you turn to page 230 of those sheets? A. I don't have them with me.

All right.

Q. On page 230, is it not indicated that cars of a higher than 15 foot, 6 inch are restricted on Penn-Central's Hudson Division east of Milepost 23.8? A. I don't find the reference quickly.

Q. Would you look at Note 1 under A-1? A. I have it. 15, 6.

Q. And that relates to the easbound tracks on the Hudson Division south of Milepost 23.8, is that not correct? A. I am having trouble with the 23.8. My copy shows just 23.

Q. I stand corrected. East of milepost 23, is that correct? A. Yes.

Q. And that is at Tarrytown, is that not correct? A. I don't know what the OW is.

Q. Do you have page 281 of the timetable? A. Yes.

[29666] Q. Do you see OW on that page? A. No, I don't. I can't read my copy.

Yes.

Q. And where is OW designated on that map? A. On the map it shows it near Tarrytown.

Q. And by east of Tarrytown, what do you understand the timetable to mean?

Do you mean on a compass direction, what direction would you understand that term to mean? A. South.

Q. Would you look at note 2 on the same page? A. 281?

Q. Page 230, pardon me.

Does not the timetable indicate on page 230 that cars of a height greater than 15 feet, 3 inches will be restricted east of Spuyten Duyvil? A. Spuyten Duyvil milepost 11?

Q. Do you know, Mr. Shannon? A. No, I don't. Spuyten Duyvil isn't mentioned in the note.

Q. Did you make any effort to check these clearances on the Hudson or Harlem Division—Hudson Division or Harlem branch of Penn-Central? A. We did not for the reason that regardless of the restrictions, there would be means available to correct them.

[29667] Q. Do you have any idea, Mr. Shannon, of the cost of those means? A. I do not have any cost figures but I would direct your attention to the fact that the New York Central has led the parade in the industry in cleaning out restrictions such as this.

A further factor in coming back again to Mr. Patchell's testimony, in addition to his dissertation on the matter of the new Perlman yard and all of the benefits to the merged Penn-Central, he also contemplated that there

would be a substantial rerouting of traffic over this route including the use of the land route to the Long Island Rail Road and in no instance did he have any problem with clearances.

If you go to his exhibit which backs up the capital expenditures required by Penn-Central, he did not find it necessary to include any expenditures for the improvement of clearances on these routes:

Q. Are you referring to H-18? A. H-17.

Q. What is a plate C car, Mr. Shannon? A. A plate C car is one that shows in the equipment register and in the clearance, various clearance publications which specifies a particular size of car that can operate [29668] under certain restricted situations.

Q. When you refer to the equipment register, do you refer to the AAR equipment register? A. Yes.

Q. Is it not a fact that the AAR equipment register states that the height of a plate C car is 15 feet, 6 inches? A. I believe that's right.

Q. And is that not standard for plate C cars? A. I don't think so. I think it is the maximum size of a plate C car.

Q. That is your understanding? A. Yes, sir.

Q. What is the normal height of a high cube car? A. Depends on the—how high the cube. They are all sizes.

Q. How high do they go? A. Some o fthe western railroads are up around 16 feet, I believe.

Q. And not higher? A. They may be.

Q. In the pages of the timetable of Penn-Central which was furnished to you, is there not a reference to high cube cars of 16 feet, 10 inches and over? A. I believe there are.

[29669] Q. Page 259. A. Yes.

Q. And you don't know what the average height or the normal height of a high cube car would be? A. There are all sorts of heights for high cube cars.

Q. Isn't it a fact that the bulk of the high cube cars would be greater than 15, 2 in height? A. I would think that is probably correct.

Q. Would you turn to page 13 of your work papers? A. 13?

Q. Yes.

Do you see up at the top, Item 7, stating clearances, Port Morris branch. Presently received high Q cars and "Plate C PFE reefers via this route? A. Yes.

Q. From whom did you obtain that information? A. From the New Haven Railroad.

Q. Specifically whom? A. I believe Mr. Zugallo.

Q. Did you verify that information? A. He gave us the particular car numbers that moved and we checked them out against the register.

Q. And what were the heights of those cars? A. 15, 2 or 3. Maybe I can find out exactly.

15, 2 is the highest.

[29670] Mr. King: May I examine that paper, please?

Q. Do—So you have no information of car over 15, 2 passing through the Port Morris branch, is that correct? A. No, sir.

Q. I take it you made no study of the cost of raising the clearance restrictions between Spuyten Duyvil and Melrose?

Mr. Lane: Objection. Question has been asked and answered.

Excerpts From Transcript

Exam. Clerman: You may answer.

A. No.

Q. Nor from Spuyten Duyvil north to Tarrytown? A. No.

• • • • •

[29693] • • •

Q. Mr. Shannon, I believe you testified earlier that you believed that the addition of the New Haven's segment to Penn-Central would increase the revenues and presumably—and the profitability of this Hunts Point traffic to Penn-Central, is that correct? A. Yes.

Q. And in making that statement, what information as to profitability are you relying upon? A. It is on the basis that traffic received from Penn-Central going to Hunts Point, that the New Haven is compensated under a divisional arrangement that will range between $80 and $85 a car.

[29694] With liquidation of the New Haven, a hundred per cent of the revenue for the Penn-Central's haul will stay with Penn-Central and they will be out whatever small expense it takes in switching the cars from Hunts Point.

Q. Is your testimony based upon the understanding that approximately 80 to 85 dollars is derived by the New Haven on the average from this traffic? A. Present traffic to Hunts Point.

Q. That is your understanding? A. That is correct, and it is also verified by Mr. Ragland's testimony.

Q. What is the eastern road division on perishable traffic from the West Coast to Hunts Point? A. I don't know.

Q. What is the New Haven's share of that eastern road division? A. I don't know what the percentages are.

Q. Are you familiar with the testimony in this record concerning those percentages? A. No.

Q. Are you familiar with the average gross revenue on a shipment of leafy vegetables from the West Coast to the Hunts Point terminal market area? A. No.

[29695] Q. You have not read the figures in the record as to that? A. No, sir.

Q. Are you familiar with the freight operating mileage between Chicago and the Port Morris interchange? A. You mean the distance?

Q. Yes. A. Oh, generally.

Q. Approximately how many miles? A. It is 900 plus.

Q. And from St. Louis to Port Morris interchange? A. A couple hundred miles farther. Around 1100 plus.

Q. You have stated that your 80 to 85 was based on Mr. Ragland's testimony.

Are you referring to his earlier testimony in this proceeding? A. That isn't what I said.

Q. Did you in part rely upon Mr. Ragland's $80 per car figure in making the statement that the New Haven currently derives $80 to $85 per car from this Hunts Point terminal market traffic? A. The $80 to $85 was based on my recollection of the negotiations which I participated in. It was verified by the fact that Mr. Ragland said there would be 20,000 cars [29696] for $1,600,000 which works out to be $85 a car.

Q. So aside from your negotiations in 1959 and from Mr. Ragland's testimony, do you have any other basis for stating that the current average revenue per car that the New Haven derives from this traffic is $80 to $85? A. I have explained my basis for the figure.

Q. You have no additional basis? A. I have no additional basis.

Excerpts From Transcript

Q. Do you know how much money Penn-Central derives from traffic between Chicago and the Port Morris interchange from the perishable traffic destined for Hunts Point Terminal market? A. I do not know and my testimony was to the effect that with the liquidation of the New Haven, whatever it was, Penn-Central would be improved by the amount of the divisions paid to the New Haven.

Q. Did you make any attempt, Mr. Shannon, to ascertain whether with the addition of the New Haven's share of the revenue from that traffic, Penn-Central's traffic of those perishables would be a profitable operation to Penn-Central? A. No.

Q. Did you ask anyone at Penn-Central for Penn-Central's calculation of its average out of pocket loss per car for perishable traffic destined for the Hunts Point terminal [29697] market during the first six months of 1967 or during any reasonable recent period?

Mr. Lane: Mr. Examiner, there has been no testimony that there is a loss. Counsel is attempting to suggest there is a loss without any basis in the record at this point.

Mr. King: Mr. Examiner, my question does not make it evidence but I am entitled to examine this witness upon the basis of his testimony and he is testifying concerning the desirability of this traffic to Penn-Central and I think I am entitled to cross-examine him as to whether this traffic is indeed desirable from Penn-Central's standpoint.

Exam. Clerman: I think within the phraseology of the question, the witness can answer without accepting your version of a loss.

A. If I had asked and I had been advised that there was a loss on this traffic for any given period, you would have

had to immediately discount the figure by some substantial amount.

There are two basic factors that you would have to consider in determining the profitability of the Penn-Central traffic.

Mr. King: Mr. Examiner, I hate to interrupt but I submit this answer is not responsive. That the question is—

[29698] Exam. Clerman: Do you recall the question, sir?

The Witness: Yes.

A. The cost figures to Penn-Central are overstated at the present time by at least $81 million in savings.

Mr. King: Again, I move to strike that remark and I ask that my question be answered, and I submit that it is capable of a yes or no answer.

Exam. Clerman: Mr. Zuck, will you read the question again, please?

(Question read by the reporter.)

A. We did not ask for the reason that it would have been an insignificant piece of input to the problem.

Q. Are you familiar with the figure in this record as to the percentage of empty to loaded refrigerator car mileage on the New York Central for the 12 months ending November 30, 1966? A. No.

Q. Do you know what the current per diem charge per miles is on refrigerator cars traveling on Penn-Central? A. I do not know what the rate is but because of how it is handled on Penn Central through their subsidiary companies, they earned $30 a share last year on the MDT Company.

Mr. King: I move to strike that answer as not responsive and ask that Mr. Shannon be directed to answer my question.

[29699] Exam. Clerman: I thought the first part of his reply was responsive.

Would you read the answer?

(Answer read by the reporter.)

Mr. Bader: Your Honor, I submit that if MDT is a subsidiary in fact of Penn-Central, then the entire answer is proper since the question is framed in terms of Penn-Central.

Exam. Clerman: That portion of the answer beginning with "But" will be stricken.

* * * * *

By Mr. King:

Q. Mr. Shannon, at page 2 of your testimony, you refer to the "large volume of existing and potential traffic in the vicinity."

What do you mean by vicinity in that statement? A. The Harlem River and Oak Point area.

Q. And on page 13 of your testimony, you refer to, and I am referring to the fifth line down, you refer to present and potential traffic volumes.

Are you there referring to the same vicinity? A. Yes.

Q. When you speak of potential traffic volumes in those [29700] statements, are you referring to the planned expansion of the Hunts Point terminal market? A. That's one.

Q. What other potential volumes are you referring to? A. I have in mind the Rodolitz development which I have been told will develop freight traffic.

Q. Did you have any other developments in mind? A. No. Just generally that as this property is developed for industry, there will be increased rail traffic.

Q. Did you have available any traffic potentially studies for this area at the time you prepared your testimony? A. You mean potential traffic?

Q. Yes. A. Nothing more than my knowledge of the Hunts Point situation.

Q. And do you have—I believe you have already testified that you didn't have that expressed in terms of number of cars, is that correct? A. Well, not specifically. I have some feel as to about what it will amount to. I happen to think that when Hunts Point is fully developed, that you will probably have something about 30 thousand cars.

Q. About double its present capacity—its present traffic, is that correct? [29701] A. Yes.

Q. And will that all be perishable traffic? A. Well, depends how we define perishable traffic. If we are including citrus fruits, meats, that sort of thing, then it is perishable traffic, but the eventual plan for Hunts Point goes beyond perishable traffic, . . .

Q. Meats, citrus and things like that travel via refrigerator cars do they not? A. Yes.

Q. Is it not a fact that the only specific information that you have with respect to present and potential traffic is in terms of volumes of traffic? A. I don't know there is anything else other than volumes of traffic.

Q. Does Penn-Central currently have any choice as to whether it will accept perishable traffic destined for Hunts Point market? A. I don't understand what you mean by choice, that they can refuse to handle it?

Q. Yes. A. I don't know of any such prerogative.

Q. Well, at the top of page 3 of your testimony, you

state "I believe that Penn-Central would make every effort necessary to reach and service industries in the area."

[29702] By area, I take it you are again referring to the Harlem River-Oak Point and Hunts Point area? A. Yes, sir.

Q. Does not that statement at the top of page 3 involve some judgment as to the profitability of this traffic to Penn-Central? A. As I mentioned a few moments ago, the profitability would just be one of the insignificant inputs as to whether or not Penn-Central would serve this area.

* * * * *

Q. Mr. Shannon, do you know the acreage of Penn-Central's remaining ownership in the Port Morris yard? A. No, sir.

Q. Is it over three acres? A. I don't know.

Q. You have no idea? A. No, sir.

Q. Referring you to page 4 of your work papers, which I believe is also page 4 of Mr. Storm's memorandum of September [29703] 17, 1968, it is there stated:

While in the vicinity"—I take it that refers to Mr. Storm, is that corrct? A. Yes.

Q. Does that refer to Mr. Storm, the "I"? A. Yes.

Q. Continuing:

> "I also inspected the Westchester Avenue yard of the PC as this would be the most immediate support on the Port Morris branch. This was a casual inspection from city streets after having left Mr. Young. The yard looked to be quite crowded with reefer cars which may have been kin support of the local meat industry, but the yard appeared to be completely full.

Excerpts From Transcript

"Mr. Young had pointed out earlier that the Westchester Avenue yard is chronically short of capacity insofar as his dealings with PC are concerned."

Does this paragraph I have just read summarize your entire study of the Westchester Avenue yard in the preparation of your testimony? A. Generally, yes.

Q. Are you familiar with the concept of an embargo on the railroads? A. I know what an embargo is.

[29704] A. It is usually for some physical reason or an accumulation of traffic, a railroad or the railroad industry asks for and receives the right to decline traffic, to handle traffic.

Q. And can that—can an embargo arise from lack of adequate switching and classification facilities in a given area? A. Oh, it might temporarily. You couldn't embargo something such as Hunts Point for a whole year because of the lack of ability to switch.

Q. In that switch situation, would the railroad, in your opinion, be obligated to go out and buy additional land in order to provide the switching and classification facilities? A. As a practical operating man, the railroad would have to provide adequate facilities.

Q. And they would have to make the capital investment involved; is that your testimony? A. Yes, sir.

* * * * *

Examination of Dr. Edward I. Altman,
Witness for the New Haven Bondholders

[29747] * * *

Direct Examination by Mr. Bader:

Q. Mr. Altman, have you reviewed the prepared rebuttal testimony of Mr. Hull? A. Yes, I did.

Q. On the basis of that review, have you made certain corrections that you would make in your testimony? A. Yes. I have certain revisions to make.

Q. Would you describe them, please, sir? A. On the basis of my review of Mr. Hull's rebuttal testimony, I made the following modifications to my prepared testimony. And I will refer to appendix A at all times when I am making the corrections.

First, column C entitled Other Real Estate. Please change the total from 1.2 million to 1 million 8 hundred 37 thousand, which is based on the Thompson testimony, TR 23535-36. That is the page reference.

In this testimony Mr. Thompson comments that the properties are readily saleable. Therefore—

Exam. Clerman: Excuse me, sir. Simply make the changes. I am sure you will be examined on your reasons.

[29748] A. Therefore, I arbitrarily assigned the additional $637,000 to the second years' receipts.

Total receipts in column 1 are thus 183,000—pardon me, $183,595,000 instead of $182,958,000. That's total receipts in column 1.

I also agreed with Mr. Hull that according to Mr. Gordon's testimony, real estate receipts should be reduced by a total of $1,797,000. And this amount transferred to column D, Road Property other than real estate.

Exam. Clerman: What are the changes?

The Witness: Real estate receipts should be reduced—

Exam. Clerman: What column is that?

The Witness: I am not sure the column it should fall in. I wasn't clear—

Exam. Clerman: I understood you are making changes in your prepared testimony.

Will you indicate what changes you want to make?

The Witness: As I go on, they will become clear, I hope.

If these receipts are related to assets in column A as Hull suggested, then this has the effect of reducing column A's receipts in the first year from $19,216,000 to $17,419,000.

Exam. Clerman: I don't find that total, sir, in appendix A.

The Witness: That's column A in appendix A, the first [29749] year is presently now 19216. Change that to 17419, thereby reducing the total in column A from $79,114,000 to 477,317,000.

Column D should not total $36,240,000.

And since I could not find any evidence as to exactly when these $1,700,000—the $7000 of dismantling expenses would actually be incurred, I allocated the column D total over the three year period as in my original testimony.

This has the effect of increasing years 1 through 3 in column D from $11,482,000 each year to $12,080,000, an increase of $599,000 each year.

Am I going too fast?

Total receipts for years one to three are now in the first year—this, by the way, is in column 1—84,801. Second year, 50,828. In the third year, 27,989.

This, when added to the remaining years four, five and six now equal $183,595,000 total receipts.

This is the same number that I referred to earlier as my new total receipts.

If these costs—again I am referring to the $1,797,000 of dismantling costs only to the real estate valued by Thompson, then they should be allocated

to years one and two instead of one, two and three as I have done it.

Finally, as a result of the aforementioned modifications, [29750] the apportionment of accrued real estate taxes, column F, would have to be altered to reflect the new schedule of real estate receipts.

Essentially taxes would be increased in the second year and reduced slightly in the other years, but the total would still remain at $16,199,000.

I have not—I would allocate these taxes to the years of the liquidation based on the total amount of land sales without deduction for dismantling costs.

I have not worked out these figures for the ultimate effect on the final column, the present value of net liquidation receipts.

That concludes my corrections.

Exam. Clerman: The witness is now available for cross-examination by Penn-Central.

Cross-Examination by Mr. King:

Q. Dr. Altman, would you turn to page 5 of your testimony, and particularly to the last two sentences in the paragraph in the middle of the page.

Do you see my reference?

A. The last two sentences?

Q. Yes, starting "The discounting procedure"— A. Right.

Q. I take it that that testimony is based upon your [29751] expertise as shown in your qualifications stated on the first three pages of your testimony, is that correct?

A. The discounting procedure that I have outlined is based on my knowledge of the field, that is correct.

Q. As stated on the first three pages of your testimony, is that correct? A. That is correct.

Q. Aside from those two sentences, is there any other area of your testimony where you feel you have brought your expertise to bear? A. First, generally my experience and my research thus far predominantly has been in the area of bankruptcy reorganizations. I believe I was called upon in the first place because of this experience.

At the same time the courses that I teach deal with corporation finance and capital budgeting and discounted cash flow procedures are an integral part of that course.

Q. Do you regard the remainder of your testimony, other than those two sentences, as being more than a mathematical study? A. Pardon me. Could you restate the question or perhaps—

Exam. Clerman: The reporter can read the question.

(Question read by the reporter.)

A. I believe the remainder of the testimony, especially [29752] the construction of appendix A, as I stated before, is based on evidence already in the testimony and putting together the figures is a matter of dealing with statistics and mathematical numbers, as you state.

Q. Well, turning to page 4 of your testimony, you refer to this previous testimony and exhibits and say you "can take no position as to their validity."

Do you mean to say by that that you do not feel you are qualified to take a position as to the validity of the previous testimony and exhibits? A. I believe that I cannot make any statements as to whether or not an asset is worth the number that is stated in previous testimony and

therefore—yes, I think I can answer that question, that is correct.

Q. And similarly, a little further down, where you say "I have no basis to pass on these matters"; is that what you were trying to convey by that statement? A. That's right.

Q. Would you please turn to the final page of your prepared statement, and more particularly on that page to the footnote designated E.

That footnote has deference to your appendix A, does it not?

Exam. Clerman: Where are you, Mr. King?

[29753] A. You are referring now to the footnote rather than the text, is that correct?

Mr. King: Sorry, maybe a page was dropped off my copy.

Q. At any rate, it is the footnote. That begins "These are the assets itemized in the Gordon testimony." A. Yes, I have that.

Q. And that E refers to the appendix A, does it not? A. That's right.

Q. And more specifically to the E column on appendix A where you have a figure of $43,623,000 A. That is correct.

Q. And that is your figure for other assets less assets retained? A. That is correct.

Q. Going down to the bottom of that footnote, you state "The receipts are assumed to be received in the first year in view of the nature of the assets in NHI 42 page 40."

Are you familiar with the nature of these assets which you list in the column Other assets less assets retained on

appendix A? A. Only by that title. Not intimately familiar with a breakdown of each individual of the assets, no.

Q. Well, included within that figure, you have in that [29754] do you not have account 712, materials and supplies? A. Yes.

Q. And do you know what assets fall within the account materials and supplies? A. Not the specific asset, no.

Q. What do you mean, then, by your reference in that sentence, I have just read to you. In view—being received in the first year in view of the nature of the assets"? A. Well, materials and supplies which you were referring to generally appear on the balance sheet within the area of current assets.

As far as these specific materials and supplies referred to here, I can make no specific statement as to my knowledge of exactly the supplies here.

That is what I meant by the general statement, the nature of the assets.

Q. Well, for example, do you know that materials and supplies includes ties out on the railroad right of way that are not applied to the track? A. I believe I know the referred to ties. As far as the other statement, I did not know.

Q. You don't intend to venture any opinion as to when those ties could be marketed, do you? [29755] A. The actual ties, no.

Q. The same for rail and other track material that might be spread around the railroad? A. That is correct.

Q. So as far as those assets are concerned, there is nothing in the nature of the assets which means that the proceeds would be received in the first year, is that correct? A. No.

Q. Do you know whether materials and supplies of railroad companies are similar to materials and supplies of

companies which are not railroad companies? A. I am sure they differ.

Q. And also included within your column other assets less assets retained, are the investments of the New Haven, is that correct? A. That is correct.

Q. Now, are you familiar with the nature of those assets? A. Only by name, again. Not exactly by—not anything as far as the particular nature of each particular bond or stock, whatever it is.

Q. I take it, then, you have made no analysis as to when those investments could be disposed of? A. Partially, yes. I would like to explain.

[29756] Q. Please go ahead. A. The items are mentioned in footnote E, granted, are a different nature and I thought about this problem as to when I should put them down as to the year that the New Haven could, in case of liquidation, receive the dollars involved. Since this would probably have taken a very extensive analysis, I looked for other testimony that would give me a lead, again, as to the salability of these assets and as stated in my footnote E that you referred to, Mr. King, NHI 42 and the following Penn-Central Exhibit, NHI 93, page 39 and 41, prepared by Mr. Hull, lists these very same assets in a lump sum as accruing in the first year.

Q. Well, I was going to ask you about that.

Does that mean that—are your relying in part upon Mr. Hull's judgment in the matter in placing those assets in the first year? A. I stated before, I was relying on all prior testimony as to the timing and the amounts of the assets.

Q. Including Mr. Hull's testimony, is that right? A. That's right.

Q. And again, with respect to that testimony, does your statement that you have no basis to pass on these matters

apply to that testimony? [29757] A. It applies to all the testimony I am talking about.

Q. Including that testimony? A. Including that testimony.

Q. So I take it that also with—strike that, please.

Account 731 through 738, equipment, are the figures for the proceeds from equipment within that category. Other assets less assets retained? A. I am not familiar with the number 730 or whatever you said but equipment is included, surely.

Q. I take it that there is—have you made an analysis of the nature of those assets to determine when they might be marketed? A. No.

Q. With respect to certain assets in account 741, which are not among the assets which are to be retained by the New Haven, are those assets included in this same figure in column E of appendix A? A. Again, I am not as familiar with the exact numbers referring to specific assets.

If you say they are not included here, the assets that are included here are given by their balance sheet titles and you will have to be a little more explicit, please.

Q. All right.

Q. Included in that $43,622,000 figure in column E on [29758] appendix A , do you have an amount of $268,800 for stipulated salvage of abandoned lines? A. Frankly, I did not go through each individual asset of this to ascertain the information you are requiring.

If you referred me to a source where it is listed—

Q. Do you have before you Mr. Gordon's exhibit, NHI 42? A. That's right.

Q. Will you please turn to page 34? A. Yes, sir.

Q. Referring you to the, about a third of the way down the page, do you see the entry Deferred Receivables less reserves? A. Yes, I see it.

Q. And do you see the subsequent item estimated salvage of abandoned lines? A. Yes, I do.

Q. And do you see the following item, scrap value of retired equipment? A. Yes.

Q. There are figures to the right for the estimated liquidation value of each of those items, are there not? A. Yes.

Q. Do you know whether those items are included within the assets which are to be retained by the New Haven under the purchase agreement? [29759] A. I believe if they are included, they would be under the other assets and deferred charges that you are referring to but I don't know specifically if those assets are in that No. 4823.

Q. Do you know what the nature of those assets are? A. Only by their title. I have not looked into them further.

Q. I take it you made no analysis of those assets to ascertain when the proceeds from them would be received, is that correct? A. I think—I thought I made it clear that all the assets among all the dollars in the $43,622,000 that are listed there are based on, I did not make an analysis of each individual asset, no.

Q. Now, again referring you to that footnote E, the latter part of that sentence that I read to you, the reference to NHI 42, page 40? A. Yes.

Q. Is there anything on page 40 relating to materials and supplies? A. What I was referring to on page 40, and maybe this is not answering your question—specifically tell me if it isn't; in that footnote I was dealing here with the rolling stock.

[29760] Q. And only the rolling stock among those assets? A. That's right.

* * * * *

Excerpts From Transcript

[29764] • • •

By Mr. King:

Q. Dr. Altman, referring back to the 1.836 million, do you now agree that those proceeds do not include the New Haven office building in New Haven, Connecticut? A. Yes, I do.

Q. Either before or after you prepared your testimony, Dr. Altman, were you shown the work paper of Mr. Gordon relating to discounting? A. Afterwards.

Q. Do you have that work paper available? A. I did on Thursday, when I first came here. I am not so sure I do any more.

Mr. Bader: I think I have a copy.

Exam. Clerman: Did you have access to the witness' work papers, Mr. King?

Mr. King: Yes. I am not talking about the witness' work papers. I am talking about Mr. Gordon's work papers, sir.

A. I have it.

Q. Referring you to what I believe is the second page, at least it is the second page of mine, it is headed "Land Discount Value" and in the right-hand corner it has CNC 1-20-67.

Do you have that figure? A. Is that "Land"—

Q. "Land discount value." Do you have that page? A. Yes, I do."

Q. Do you see, about a third of the way down the page, the entry: B W Thompson Balance, and the figure next to it: $1,837,189? A. Yes, I do.

Q. How did Mr. Gordon go about discounting those proceeds? A. Well, he uses a discount figure of .887.

Q. Is that a derived figure? A. It must be, because it's the same figure that's above when he says "derived."

[29766] Q. Well, is it correct then that Mr. Gordon discounted the Thompson proceeds in the same manner as he discounted the Mason proceeds? A. I don't know if I understand you.

You say the same manner. He uses the same discount rate for the Thompson proceeds as the total for the mason proceeds. That is all that's clear here.

Q. Is that the same as pro rating the proceeds over the same six-year period? A. I really can't say, Mr. King, because I—to be honest with you, I don't know Mr. Gordon arrived at this .887.

Q. Well, will you look in the figure to the left of the entry .887 on derived? A. Right.

Q. Do you see a total figure which represents the total mason proceeds? A. That's right.

Q. And will you look to the right of that same entry, do you see the dis—the total discounted value of those proceeds? A. That's right.

Q. And do you know that if you divided the figure on your right, the discounted value into the total mason [29767] proceeds, whether you would reach the derived figure? A. You would have to multiply the two.

Q. If you divided the 77 million 431,515 by the 87 million 292,265, would you reach the .887 on derived discount factor? A. It's kind of—yes, you got that answer.

It's kind of working from the wrong way, but yes, sir.

Q. Wouldn't that have the effect once you applied that derived figure, to the Thompson balance, of discounting the Thompson proceeds over a six-year period? A. Again, I don't know how Mr. Gordon got his .887. To use a derived figure when you are discounting cash flows to me is an inappropriate procedure.

You should discount cash flows at the time that they are received by their discount figure which applies at that particular point in time.

To derive a discount figure makes no theoretical sense. He may have done it for practical reasons, but I can't see why he did it.

Q. Are you quarreling with his discount factor or are you quarreling with his spread as to the time of disposition of these proceeds? A. Are you talking about the Mason or the Thompson [29768] now?

Q. The Thompson. A. Well, I don't think I can quarrel with Thompson proceeds, because as this was just introduced in my original statements today, I introduced the 1837 which I hadn't mentioned or noted earlier, and I introduced them as occurring then in the first two years.

It's only based on the Thompson's own testimony.

Q. Would you agree that Mr. Gordon at least spread these proceeds over six years?

I think that's my question. A. Again, we will have to assume what Mr. Gordon did. If the .887 is derived for the six years of the Mason figures, then I would agree that he did the same thing for the Thompson figures.

That's if he did it that way.

Mr. King: I have no further questions, Mr. Examiner.

Exam. Clerman: Did I understand Appendix A, Mr. Altman, you subtracted the expenses from the receipts and then applied the discount rate to the net; is that correct?

The Witness: That's correct.

Exam. Clerman: Did you try discounting the receipts and the expenses independently?

[29769] The Witness: No, but you should come out with the same answer.

Exam. Clerman: In your opinion the same answer would result?

The Witness: Yes.

Examination of Norman J. Hull, Jr.,
Witness for Penn Central

• • • • •

By Mr. King:

• • • • •

[29773] The Witness: On page 10, the middle of the page, there is a table, three columns headed Gordon, Altman and Hull.

In order to have these figures tie in with others appearing elsewhere, I would like to amend the figures on that first line.

Under the Gordon column the figure should be 17 million 563,058.

In the second column, under Altman, the figure should be 14 million 960,000.

In the last column under Hull, the figure should be 16 million 963,364 dollars.

On the next line, discount of expenses, in the last column under Hull, the figure should be 5, million 684,183 dollars.

On page 11, the fourth line from the bottom where I say—fifty line from the bottom, starting: "In a transaction involving over 500,000 dollars," should be amended to read a transaction involving 500,000 dollars or over or its rental equivalent.

[29774] Mr. King: Does that complete your corrections and additions, Mr. Hull?

The Witness: Yes, it does.

• • • • •

Cross-Examination by Mr. Bader:

[29784] • • •

Q. On the basis of the testimony of Mr. Thompson, would

it be correct to apportion receipts from liquidation of the Thompson property over the six years of the liquidation period, Mr. Hull? A. If Mr. Thompson was correct and that properties were saleable within a year or a year and a half, very quickly, apparently here he says within a year, a year and a half, very quickly, he cut himself off. I don't know whether he was going on further.

Q. There is a period at the end of that sentence, isn't there? A. Very quickly, yes. There is a period. It would not be proper to allocate it over the entire six-year period.

Q. You should allocate it in at most the first two years? A. I don't know what very quickly means. Whether [29785] that means two or two and a half, or whether it just means a year, a year and a half.

Q. As I understand your testimony about receipts from other assets less assets retained at pages 4 and 5, Mr. Hull, the figure 6,497,700 that appears in relation to equipment in the second year. A. Yes.

Q. What does that have reference to? A. That is—the best way I can describe it is the Gordon evaluation as modified by the Commission of Passenger equipment, passenger equipment carried in New Haven's account No. 54.

Q. Were you aware at the time that you assigned equipment to the second year—sorry, assigned this passenger equipment to the second year of liquidation and that Mr. Gordon had testified at NHI-42 at page 40, "The rolling sock would be sold either for resale or for scrap during the first year after revenue rail service was discontinued." A. Yes, sir. I am aware of that.

Q. If Mr. Gordon was correct when he made his liquidation study in that statement, then isn't it true that passenger equipment should be carried in the first year? A. If he was correct, it should be in the first year.

Q. You made a discount study, did you not, Mr. Hull, [29786] in connection with the earlier hearing? A. I did.

Q. And that discount study was received in evidence as NHI-93, was it not, Mr. Hull? A. That's right.

Q. Do you remember how long you worked on NHI-93, Mr. Hull? A. A very short period of time.

Q. How long? A. I think that the Pennsylvania Railroad and the New York Central were given thirty days to value the entire New Haven Railroad.

Q. How much time did you work on it? A. I was in at the tail end of it working day and night perhaps—well, I worked on and off during the period of the thirty days but the bulk of the work of my people and myself was devoted to not more than the last three days.

Q. Would you confirm for me, sir, that in your study of discount rates which appears in NHI-93, at pages 39, 40 and 41, and in revised form, NHI-93A at pages 39, 40 and 41, you treated materials and supplies, investments, equipment in Account 741 assets not retained as being liquidated in the first year of liquidation? A. Yes, sir.

[20787] Q. Do you recall how long after you circulated NHI-93, you circulated NHI-93A, Mr. Hull? A. No. I believe that was circulated the day I went on the witness stand—no, I never did get on the witness stand—yes, I got on the witness stand, I put in the amended pages and there was no cross examination. Whenever that day was, that's when I submitted it.

Q. You made corrections on pages 39, 40 and 41 of NHI-93A, did you not? A. I am looking for the pages I made the corrections on.

Q. I didn't mean you corrected them physically, but there were corrections on NHI-93A, those three pages, from NHI-93, weren't there? A. Oh, yes. The amended pages had corrections on them. There were more than three pages.

Q. Yes, I know that. I am only interested in those three at the present time. A. Okay.

Q. At page 6 of your testimony, expenses of land sales, item 2. At the time that you prorated the expenses derived by Mr. Thompson of $260,000 among the six years, were you aware how Mr. Thompson had testified he had allocated those expenses and derived them? A. I think my answers with respect to this would be [29788] the same as with respect to the proceeds.

Q. Isn't it true ,though, sir, that Mr. Thompson said specifically that he only took a year or a year and a half worth of taxes and that's how he derived a substantial portion of $260,000? I don't mean here accrued taxes. I mean the new taxes. A. Okay. Yes.

Q. Page 8 of your testimony, you refer to expenses relating to Mr. McCann. A. Page 8?

Q. Yes, sir. A. Yes, sir.

Q. You find there that you treated all appraisal fees as occurring in the first year of liquidation? A. Yes.

Q. Were you present in the hearing room, Mr. Hull, when Mr. McCann testified here? A. In the first—

Q. He didn't testify there. He testified only in this reopened proceeding. A. Yes, I was.

Q. Do you remember what he said about when the appraisal fees would take place? A. I remember what he said about all the expenses in that table because I made notes.

[29789] Q. Didn't he say to the appraisal fees, you do that when selling the property, each parcel? A. Just prior to sale. It means the same thing.

Q. On that basis is then, wouldn't it be necessary to move your appraisal fees around and allocate them over the years of sale? A. Yes. I think maybe it should be prorated over the years of the sale but in answer to some of the other things, I think I should move some of my real

estate department expenses up too. Perhaps on the basis of his latest testimony this whole schedule should be revised.

Q. You would agree with me in any event that the appraisal fees schedule should be revised, wouldn't you? A. Based on his most recent testimony, yes.

Q. And they should be apportioned over the six years, is that correct? A. I would apportion them now based on what Mr. McCann said, over the proceeds. Over the six years.

Q. In a fashion similar to the method you used and Mr. Altman used for apportioning accrued real estate taxes; right? A. Correct.

Q. In apportioning accrued real estate taxes, Mr. Hull, you, as I understand it, used the total real [29790] estate sales figure after reducing the first year by 1,797,000; is that right? A. Correct.

* * * * *

Cross-Examination of Robert E. Simon, Jr.,
Witness for Penn Central

[29803] * * *

Exam. Clerman: * * *

Before we get to the supplementary material that you brought with you today, Mr. Simon, on page 2 of your prepared [29804] testimony in the third paragraph, does this represent the thrust of your testimony?

The Witness: The entire third paragraph?

Exam. Clerman: Yes, sir.

The Witness: Yes, sir.

Exam. Clerman: Were you asked to do—to express an opinion on any other matter?

The Witness: Not that I remember.

Exam. Clerman: On page 5, in the first paragraph beginning on that page, you refer to a 9 per cent figure.

What does that relate to, sir?

The Witness: That relates to the cost of financing vacant land in the market place.

Exam. Clerman: How does that relate, sir, to the relationship of the fair market value of land in bulk as compared with the projected net proceeds of retail sales of the same land in smaller parcels?

The Witness: To determine market value, you traditionally determine what a willing buyer would pay a willing seller. And the willing buyer's calculations govern. A willing buyer in looking at vacant land will have to determine for himself how he is going to finance the acquisition and 9 per cent in today's market and in recent markets is a very favorable rate for borrowing against vacant land.

[29805] Q. Would that apply to land in bulk or land in smaller parcels equally or to one and not the other?

The Witness: What I am talking about is the calculation that the willing buyer of land in bulk will go through to determine what he is willing to pay.

Exam. Clerman: Would that apply as well to a willing buyer of land in parcels?

The Witness: I haven't discussed that and a willing buyer of parcels could be dealing in a tract that is ready for immediate development with a variety of kinds of occupancy and the kinds of occupancies have a great deal to do with the price of mortgage money on retail parcels of vacant land.

In other words, if there were a net lease of the ground to Penn-Central, that would command one interest rate. It this was a peripheral speculative retail piece of land in a residential area and the borrower has—was not substantial, the rate could go as high as 20 per cent or higher.

Exam. Clerman: I am still not sure whether the answer to my question is in the affirmative or in the negative.

The consideratiofis that go into this 9 per cent figure, would they apply as well in consideration of the purchase [29806] of parcels of and, land in retail that you described?

The Witness: No.

Exam. Clerman: They would not?

The Witness: No.

Exam. Clerman: I don't understand how that enters into a relationship with the fair market value of land in bulk as compared with the projected net proceeds of retail sales of saler parcels?

The Witness: The exercise here was to determine the market value of the bulk sale of land. I addressed myself only to the principles involved.

I did not make any appraisals. To determine the market value of bulk land you have to put yourself in the position of a willing buyer because the seller's problems are an irrelevancy in the market. It is the buyers who determine what is going to be paid.

Exam. Clerman: Was this the 9 per cent—was this 9 per cent, would it include a discount to present worth?

The Witness: No. This is the cost of borrowing money to make a land acquisition.

Excerpts From Transcript

Exam. Clerman: And your are suggesting that the 9 per cent would be in addition to the 6 per cent discount to present worth which you discussed at the top of page 5?

The Witness: In dealing with the discount, I apply [29807] that only to the equity portion. I don't apply it to the borrowing portion.

Exam. Clerman: Well, in my opinion, the witness may be examined on the entire statement.

• • • • •

[29808] • • •

Exam. Clerman: I suppose I am just as simple as you are, then. It appears to be complicated to me, too.

[29809] The Witness: May I suggest a clarification because it is enormously simple.

Exam. Clerman: A clarification of what, sir?

The Witness: Of what all these figures stem from.

• • • • •

[29811] • • •

Cross Examination by Mr. Pollack:

Q. Mr. Simon, I see from your testimony, R-29, page 1, that you have been the president of Simon Enterprises Co., Inc., since 1935, is that correct? [29812] A. Simon Enterprises is a word loosely used to express what I do and in that sense, yes, I have been president of it since 1935.

The name itself was originated later.

Q. I was referring for the moment in the third paragraph on page 1 to the family-owned real estate company. Is that—by family-owned real estate company, do you mean just you? A. No. I mean Hercer Corporation, which is owned by my three sisters and by me.

Excerpts From Transcript

Q. When did you become an officer of Hercer Company, sir? A. In 1935.

Q. What does Hercer Company do? A. It has invested in and developed real estate.

Q. As I understand it, it is Hercer Company that is the family-owned real estate company you are referring to on page 1? A. That's correct.

Q. And not Simon Enterprises Co.? A. That's correct.

Q. Are there any other members of Simon Enterprises Co.; Inc., besides yourself? A. I am the sole owner.

[29813] Q. Does Simon Enterprises, Co., or yourself personally—is Simon Enterprises Co. a corporation? A. Yes, I think we will clarify if you think of Simon Enterprises as being synonymous. It is a way of expressing something in a public relations way rather than saying Robert E. Simon, Jr.

I have said Simon Enterprises. It is incorporated. It has no assets. It is a trade name, if you like, although that's a very loose use of that.

Q. Do you personally, and I am assuming your last statement that Simon Enterprises Co. Inc. has no assets. Do you personally own or manage office buildings, commercial and residential properties in the United States and Canada? A. As a participant in groups that do the owning and the operating, yes, I have. I have been the operating head.

Q. What do you mean by participant, participate in groups? A. Until this year everything I did was owned additionally by my sisters and my friends and by others, sir.

Q. So would there be different corporations or different partnership enterprises which would own land throughout [29814] the country? A. Yes.

Q. And I take it for some of them you were the operational head and your family and other friends invested, is that correct? A. That's correct.

Q. Did you yourself also invest in these real estate enterprises? A. I am a part-owner of Hercer Corporation, and Hercer Corporation, as I mentioned earlier, is also owned by my three sisters.

This is the vehicle through which we made investments.

Q. When Hercer Company made an investment in real estate—into a real estate situation, were you usually the operating head of the real estate development? A. Usually.

Q. Did any of these—strike that

Do you or your family through Hercer Company or other organizations own any office buildings in New York City? A. Not at present.

Q. Do you manage any office buildings in New York City, sir? [29815] A. Not at the present.

Q. Do you own any commercial properties in New York City? I mean the entity or entities which we have been describing here as a family-owned real estate enterprise? A. Yes.

Q. Do you own commercial properties in New York City now? A. Yes.

Q. Can you tell me what commercial properties in New York City your organization owns at the present time? A. Acreage in Staten Island.

Q. Is that vacant land, sir? A. Part of it is vacant and part of it is occupied by what is known as Korvette City.

Q. Was Korvette City on that land when you purchased it? A. No.

Q. So that part of your development of that acreage was the building of Korvette City; is that correct? A.

No. This was a ground lease to the man who did the building.

Q. You sold the ground lease—you gave a ground lease to the man who did the building? [29816] A. We executed a lease.

Q. And were you the operational head—the operating head of this acreage in Staten Island? A. Yes. Just before the bridge was built, I bought an initial tract of 165 acres. Later expanded to 237 acres and this I did for Hercer Corporation and a group.

Q. I take it part of your job as operational director of this land was to negotiate that ground lease? A. Yes.

Q. Is that acreage being developed for use at the present time, sir, other than the Korvette City? A. 130 acres was sold to Macy's in partnership with Sears-Roebuck and A & S.

Q. Is that for a shopping center? A. For what is called the Downtown of Staten Island. It's more than a shopping center. It's a whole shopping center, office complex.

This land is now known by the City Planning Commission as the heartland of Staten Island.

Q. Is that an official designation? A. No.

Q. As operational head of this property, sir, are you really engaged in selling off parts of the property for commercial or residential development? [29817] A. I am interested in bulk sale and it is a bulk purchase and I am wholesaling it actually, rather than retailing it.

Q. Is that the only commercial property that your family organization now owns in the City of New York? A. Yes.

Q. Does your family own any residential property in the City of New York? A. That's all we own in New York at the moment.

Excerpts From Transcript

Q. When was the last time your family companies owned an office building in New York City? A. I would say about 1960.

Q. And what office building did it own then, sir? A. The Fisk Building.

Q. Where is that located, sir? A. 57th Street, Eighth Avenue and Broadway.

Q. And it sold that—by it, you sold that building in 1960; is that correct? A. Yes. I think I bought it in about 1954, modernized it, raised its level of operation and sold it to Harry Helmsley and Larry Wien.

Q. In 1960? A. The dates are approximate.

Q. Did your family organization own any other office [29818] buildings in the 1960s in New York City? A. No.

Q. Did it manage any office buildings in New York City in the 1960s other than the Fisk Building? A. No, we have never been a management organization other than for properties we owned.

Q. I take it then in the third paragraph on page 1, when you describe the real estate organization, it owns and manages, that means manages only what you own? A. Right.

Q. At the present time in dealing with your advice to Secretary of the Interior Udall, did you advise on the purchase and sale of Indian lands? A. There is relatively little purchasing involved, although there occasionally does arise an occasion as has within the last six months, where a purchase is involved.

Basically, my advice is—

Q. Do you advise on the sale of Indian lands? A. Not the sale, the development.

Q. Are you or any of your family organizations builders, sir? A. The only place where we have been builders is in Reston, Virginia.

[29819] Q. I take it in Reston, Virginia, your organization sold its interests a year ago; is that correct? A. That's a euphenism.

Q. Would you explain then what your organization did acquire a year ago with regard to Reston, Virginia? A. I don't know how much time you want to devote to it. I will try to compress it.

Basically, Gulf Oil Corporation was a partner of Reston, Virginia, I think which was the corporation that succeeded other corporations in name and acquired 6750 acres of land in Virginia for the purpose of developing a new town.

During the tight money situation—

Q. You described sale as a euphenism. Just tell me how you got out a year ago. A. If you allow me one more sentence.

Exam. Clerman: Go ahead.

A. In 1966 when the tight money situation arose, Gulf then a potential 40 per cent partner decided to become a 95 per cent partner and so that's what happened a year ago.

Q. I assume they bought your interest out; is that correct? A. That's correct.

[29820] Q. And you sold your interest out? A. That's correct.

Q. Are you working on any development of Indian lands at the present time? A. Yes, I am.

Q. Where? A. In Albuquerque. In Tucson. In Phoenix and when I say in, I mean in the environs of. Outside of Reno. And between Hollywood and Fort Lauderdale in Florida.

Q. Are those for commercial development of the land,

sir, or residential development of the land? A. They involve all kinds of uses.

Q. Have you held any other jobs with the Federal Government other than special counsel to Secretary of the Interior Udall? A. Just during the war.

Q. So that on page 2, in the second paragraph, when you say "My real estate experience in Reston and the Federal Government, with the words "the Federal Government," you are referring to your service as special counsel to Secretary Udall; is that correct? A. Yes.

Q. How long have you been acting as special counsel to Secretary Udall? [29821] A. For a year.

In addition, I have been counsel to—well, I haven't been counsel; I have been an advisor to H U D. That wasn't exactly a job.

Q. Are you involved in any way in the financing of Indian lands? A. Yes.

Q. Is that for financing the development of these lands? A. Discussions of it, yes.

Q. On page 2 you say, "The problems of financing, developing and market large scale parcels of real estate." Do I understand it that financing, developing and marketing in your mind is all one ball of wax? A. To an extent.

Q. As I understand it, you are not doing any physical bidding on any Indian lands, are you? A. I am consulting with the Government. I am arranging for others to become interested in doing this.

Q. What do you have in mind when you refer to, in that same paragraph on page 2 ,"Large scale land development" in terms of the scale? A. Oh, I would say that my experience relates to acreages in excess of a thousand acres. That is what [29822] I mean by large scale, although it also could be large scale if it were a hundred acres within a metropolitan city, so I guess the Staten Island acreage

of mine could be called large scale within the frame of reference of New York.

Q. You would call that large scale? A. Yes.

Q. Other than in tightly compacted areas such as New York City, a large scale parcel of real estate in terms of your testimony means a thousand acres and up; is that correct? A. This has to be arbitrary.

Q. I just want to know what you have in mind in your testimony, sir. A. I guess it depends on the location. That is what I am realizing as we talk. If you were to go to Great Neck, Long Island a hundred acres is probably not available and that would be large scale there.

As you move further out on the Island, the numbers increase.

When you deal with Indian lands as I do, we are dealing with tracts that run as high as 16 million acres as what the Navajoes have and some of the tracts that I am dealing with are 46,000, 220 thousand 500 thousand, [29823] just to name three that come to mind.

Q. So if I understand now what you mean by large scale parcels of real estate is not acreage as such but the relative scarcity of acres in the area? A. Well, I guess it's the size and the complexity of the problems that I am really talking about.

I am involved in two transactions now, one in Putnam Valley involving 670 acres and one in New Jersey involving three thousand acres.

I consider these both to be large scale.

Q. I am trying to see if we can have anything definite.

Do you mean any parcel of real estate with large scale problems then? A. No.

Q. In terms of large scale, do you mean large amounts of money? A. I guess that's part of it.

Q. Is that more a part of it than large scale in terms of acreage? A. We are on a semantical kick, but I would say that the—basically if you are dealing with a hundred acres in Manhattan Island you are dealing with a great many different owners and a great many different users and that is what makes it large scale.

[29824] If you are dealing with a hundred acres in the outer reaches of Westchester County, you might very well be dealing with one user. And one industrial user. That would not be large scale.

Or one concept. A subdivision. That would not be large scale.

Q. By your Indian lands, although they are one owner, they are large scale? A. It was the user, not the owner that I was talking about.

In other words, a lot of large tracts are in single ownership but it is the users that make it large scale, the complexities of the problems and the numbers of people who will be involved.

Q. You say in your third paragraph on page 2, "I have been asked to express an opinion," and the paragraph follows.

Q. Do you see that? A. Yes.

Q. Who asked you to express an opinion? A. Mr. Perkins.

Q. When did he ask you to do that, sir? A. Three weeks ago? That would be my guess, but I am not too reliable on that kind of recollection.

[29825] Q. Can you tell me what specifically he asked you to do? A. He asked me to express my opinion as to the principles involved in estimating the relationships of values of real estate in bulk and retail real estate.

Q. Do I understand what you mean by a retail sale is a

sale to the personal or organization that will actually use property? A. Yes.

Q. And I take it then when you referred to an owner retail sale in your testimony here, you were referring to a sale to an intermediate purchaser? A. Excuse me? Where is that? Where is that reference, sir?

Q. There is no such reference, sir.

You referred to retail sales, as I understand your testimony, you are not testifying as to retail sales; is that correct? A. I am talking about the relationship of value between sales in bulk and sales at retail.

Q. Those are the two kinds of sales involved.

Do I understand then when you talk about a "sale in bulk," you are talking about a sale to an intermediary and not a sale to an actual user of the property? [29826] A. The general principles apply.

That doesn't need to be the whole picture because sometimes a single user might buy a large scale tract of land for his own use, such as I B M.

Q. What is your scale of reference in this testimony, sir? Is a sale in bulk a sale to a wholesaler? A. It's the sale to a buyer of the entirety.

Exam. Clerman: Does the definition relate to the buyer or does it relate to size?

The Witness: It relates to the relationship between the price that a wholesaler will pay as compared to the gross sales price that he will receive.

Exam. Clerwin: No, I mean the difference between bulk and retail as you have it here. What are the criteria?

The Witness: A single buyer buys a large scale tract and goes through the exercise of finding buyers

who will use the smaller tracts and therefore, it is a wholesale concept just as there is a wholesaler in the retail field.

Somebody buys in bulk and sells at retail.

Exam. Clerman: I am sorry to interrupt. Go ahead.

Q. In your last answer, I don't want the record to be [29827] confused, you said, at the end of your last answer, just as in the retail field.

I take it when you were referring to that retail field, you meant consumer goods? [29828] A. Yes.

Q. So that what your testimony relates to here, Mr. Simon, is a single purchaser of property who would, in turn, sell off the property probably to many users and who would obtain his profit by reason of its purchase and resale? A. Right.

Q. And in the last paragraph on page 2, I take it in terms of the economic scheme of things, this wholesaler will make his profit because he is performing a service which he can do which the present owner prefers not to do? A. Yes.

Q. And so in turn the present owner is saving himself the work and effort of attempting to make retail sales and sharing the profits of the land as it were, with the wholesaler who performed the service? A. Also the risk. He is saving himself the work. The work effort and risk.

Q. He is sharing both the risk and the profit? A. No. What you said was the other way around.

Q. Explain what you mean. A. What you said was the owner made a decision not to involve himself in the work and the effort. I said also the risk.

[29829] Q. And the wholesaler in turn receives his profit in the economic scheme of things both because he does the

work and effort and because he takes some of the risk, if there is any, of holding the property for a period of time; is that correct? A. Yes.

Q. I take it when you say that a wholesaler accepts the risk of holding the property, you do not intend to exclude the possibility that the wholesaler may obtain a gain because of the appreciation of the value of the property while he is holding it? A. Every wholesaler hopes to do that.

Q. In fact that's what you do in your business, isn't that right? A. Nobody goes in expecting things to turn bad. Everybody goes into a venture expects it to turn out well, and that's what I do also.

Q. Part of what you do in bulk sales is you purchase a large portion of land, hold it for a while, attempt to develop it yourself and hope that the price of the land from the effect of your development causes the property to appreciate; is that right? A. It's not a complete statement, no, because as you said earlier, perform a function as a wholesaler which involves marketing functions and sometimes other [29830] functions. So that the profit that one expects to get comes from that function.

Q. When you say the profit one expects to get comes from that function, are you referring to the work function as a wholesaler? A. Yes.

Q. And as I understand it, then a wholesaler does not expect to reap any profit from the appreciation of the property? A. That's correct. That's the difference between expect and hope.

Q. In terms of the other than work function of the wholesaler, I assume he hopes the property will appreciate and hopes that there will be no depreciation of the property while he is holding it; is that correct? A. That's right.

Q. That's what you had in mind when you said the risk?

A. The risks are more time, really, than anything else. This is—

Q. Is the risk— A. I think you asked me what I meant by risk and I will tell you.

Exam. Clerman: Go ahead.

Q. That isn't what I asked. If you have more to [29831] say—I think we will ge tat it.

When you say the risk, then, are you referring to a financing risk of the wholesaler As opposed to a risk of the physical property actually depreciating in value? A. Partly.

Q. When you say at the bottom of page 2, referring to the bulk sales price, it will be substantially below the aggregate retail values projected by the owner, do you mean the present owner of the property in your hypothetical situation or the wholesaler when you used the word "owner"? A. I am talking about the seller there.

Q. Do you have any rule of thumb that you use in your business for the amount that a bulk sales price will be below the aggregate retail values? A. No.

Q. That depends, I take it, on what the wholesaler intends to do with the property or thinks he can do with the property? A. Depends on all the conditions that relate to the use and development of the property.

Q. Turning to item No. 5 starting at the bottom of page 3 of your testimony, and continuing on into page 4, was it your assumption in outlining these assumptions [29832] that these "realistic estimates" are already in the record of these proceedings? A. Actually, these were just the givens to me and I assume they are in the record.

Q. Did somebody give you these assumptions? A. I was

not to be involved in appraising and I have not been involved in that.

Q. Did somebody give you the list of assumptions that starts on page 3 and continues over to page 4? A. The assumptions actually start earlier.

Q. Well, at the top of page 3 you say, "I shall first enumerate certain assumptions I am making."

Are there any other assumptions than those that follow the statement at the top of page 3? A. Basically these assumptions were recorded as a conversation, a dialogue of all the things that ought to be considered and the only one that I will take as my own assumption is that there were reliable real estate appraisers because it's safe to assume on a case of this size with the parties involved that they were reliable.

Q. The other assumptions, I take it, were given to you by counsel in this dialogue? A. That's right.

Q. Can you tell me—were you given for your study [29833] any of the material and evidence in this case? A. The only thing I saw was the Ritter rebuttal.

Q. Before you prepared R-29, sir, were you given any of the testimony in this case? A. No.

Q. Were you given any materials at all to aid you in preparing R-29? A. No, I am dealing in general principals.

Q. I assume though, since at the bottom of page 4 you referred to the Interstate Commerce Commission, you were given some information with regard to the Interstate Commerce Commission's decision in this case? Is that correct? A. Will you rephrase that question?

Exam. Clerman: Do you understand the question?

The Witness: I didn't, no.

Q. At the bottom of page 4 you referred to, that your approach departed from something that you had been advised had been adopted by the Interstate Commerce Commission.

Were you given any materials or reports of the Interstate Commerce Commission? A. I don't believe so, no.

Q. And the advice you referred to in that sentence at the bottom of page 4, is that, again, the advice of [29834] counsel? A. Yes.

Q. In other words, he told you what he thought had been adopted by the Interstate Commerce Commission and you acted on the basis of his description? A. That's right.

Q. On page 4 did counsel tell you or did you have anything in mind under the item F "contingencies"? A. That's always included in any real estate calculation. Contingencies appears always.

Q. Is this something you included in this— A. I was told that this was included here and it always is.

Q. Were you told the purpose of your testimony here today, Mr. Simon? A. Vaguely, yes.

Q. What were you told—what did you understand to be the purpose of your testimony? A. I understood there was a difference of opinion as to the valuation of the land between the railroad and the bondholders.

Q. When a wholesaler attempts to or considers purchasing a large piece of real property, is his offering price, so to speak, in any way related to offering prices that may be made by other prospective wholesalers? [29835] A. Well, to an extent, of course. But there are no identical—well, that's not true but generally speaking there are no identical pieces of land. Each has its own characteristics and these have to be reflected in the price.

Q. Suppose, for example, Mr. Simon, you had a large plot of land for which the wholesaler—unimproved—for

which a wholesaler offered a price of $20-million to the present owner and you, as another wholesaler, are interested in purchasing that piece of property.

Is your evaluation of the price you would offer affected by the then outstanding offer made by another wholesaler? A. It shouldn't be.

Q. Is it usual, Mr. Simon, when a wholesaler purchases a large scale piece of property, as you have used the term here, that he knows firmly the price at which he can sell each and every one of the potential parcels in that land? A. You set up somehting that doesn't exist.

Q. So it would be extremely unusual then for bids to have been made by retail purchasers prior to the time that the wholesaler attempts to make his purchase? A. Well, even if there were bids made, that's not the same thing as having accomplished the closing of a [29836] contract. So that what you are setting up is a situation in which contracts for resale and retail have all been worked out and signed when the wholesale contract is entered into and conceivably that's happened sometime in history but it would certainly be extraordinary.

Q. It's not what you have in mind here? A. No.

Q. Would you testimony, then, be quite different if you had a wholesaler who knew quite precisely the manner and the price for which he could sell all the respective parcels? A. If there were an underwriting by a financially viable underwriter, it would be totally different.

Q. Is that the only situatoin that you can conceive of in which it would be different? A. At the moment.

Q. Suppose, for example, Mr. Simon, you had a large tract of land in Staten Island and you entered into contracts with Macys, Korvettes, Gimbels and some others subject to your purchase of the land or contingent on your purchase of the land.

Would such a situation change your evaluation of the price you would offer for the land? A. If, as you describe it, all of the land to be bought in wholesale had been presold at retail, then [29837] the only factor left would be the fact of time and money.

Q. What factors other than time and money do you take into consideration in R-29, sir? A. Different relationship in time, which is, as I was trying to say earlier, perhaps the most important ingredient. Here we have a situation—

Q. The question was—

Exam. Clerman: Let the witness finish.

A. You set up a situation in which it has known time. A transfer of land would go from a prospective buyer to his presold customers, so the cost of the money during the intervening time is something finite and calculable. The greatest single hazard to a wholesaler is the element of time because the financing cost, the holding cost which are finance and real estate taxes are the greatest single hazard he faces.

I understand that there is a six-year program postulated here. I don't know—

Exam. Clerman: We will get into that.

A. (Continued) In just describing time, I don't know how a war, how a recession would affect the time element but that is extremely important and can change the figures enormously.

In addition, and you asked me a very general question so I will just touch a few of the high spots [29838] which may or may not be relevant here.

The other aspects that affect—

Excerpts From Transcript

Exam. Clerman: Rather, sir, then getting into areas which may or may not be relevant, perhaps Mr. Pollack will bring out the relevant aspects.

The Witness: Could he read the question?

Exam. Clerman: Mr. Zuck.

(Record read.)

Exam. Clerman: Have you answered the question, sir?

The Witness: Not fully.

Exam. Clerman: Go ahead, sir.

Mr. Pollack: I move to strike everything that went before. I can't understand any answer yet.

Exam. Clerman: Let's deal with it when the witness is finished.

• • • • •

[29839] • • •

Q. Mr. Simon, would you turn to page 6 of your testimony. The paragraph on that page starts out "The uncertainty as to the precise period for marketing."

[29840] Does this paragraph on page 6 represent what you had in mind when you previously testified that factors involved in your testimony here were time and money? A. At that time we were talking about a hypothetical case where you had suggested all of the land to be bought at wholesale, had been presold at retail.

Q. I take it your paragraph 1 on page 6 refers to uncertainty of time and that is the factor you are intending to convey by this paragraph, is that right? A. That's right.

Q. And as I understand this paragraph, uncertainty of time to you and your assumption in this paragraph means a delay, is that correct? A. That's right.

Q. You recognize, of course, that there is an other possible uncertainty involved? A. Of course.

Q. And in fact it is entirely possible that the resale can in fact be speeded up- A. That's right.

Q. That is, of course, an uncertainty as well? A. Correct.

Q. I take it then that if one assumes that the time the wholesaler will hold the property is known and fixed, that [29841] an assumption would make a substantial difference in the thrust of your testimony? A. We went over that once before. This can only happen, as I suggested, if there is an underwriting because otherwise, it is inconceivable.

How can you know when you are going to dispose of hundreds of properties to hundreds of users or owners?

Q. If you make the assumption that we know that, sir, there would be a substantial change in the thrust of your testimony, is that correct? A. I don't think the assumption can be made unless tagged with it is what makes the assumption possible.

Q. Let's assume for these purposes, Mr. Simon, that it is a fictional assumption that I am making to you right here and now; that you know when these properties will be disposed of.

Will that assumption substantially change the thrust of your testimony?

Mr. Perkins: Mr. Examiner, I object to the frame of the question in its present form.

There is no factual foundation whatsoever for the question and the witness' qualifications, such as he deals in the world of reality, and I think that he has indicated that he cannot, dealing in the world of reality, make such an [29842] assumption, and I

do not have a witness who can testify as to the world of unreality.

Exam. Clerman: Overruled. The witness can answer, treating it as a hypothetical question.

A. All right, assuming that there is knowledge which must come from some place, certainly then the risk of time has been eliminated by definition.

Q. I am not suggesting, Mr. Simon, in my assumption, that time has been eliminated. A. Neither am I by my statement of—

Q. Just the risk of time.

Exam. Clerman: Is your answer yes?

A. Yes.

Q. Item 2, starting on page 7, sir, —excuse me, may I go back one notch.

Did you prepare this testimony, R-29, sir?

A. I was intimately connected with its preparation.

Exam. Clerman: Is that a negative or an affirmative? Did you prepare it?

The Witness: I participated in preparing it.

Q. With whom, sir? A. With counsel.

Q. Did you do a draft of R-29, sir? A. I reviewed drafts and I did an oral draft.

[29843] Q. By an oral draft, do you mean you dictated a draft or you told somebody your ideas? A. We talked our way through it.

Q. I take it, then, what happened is you told your ideas and discussed your ideas with counsel and counsel arranged for a draft to be prepared and you reviewed it? A. Correct. And edited it.

Q. Do you recall if there was any more typing following the paragraph that appears on page 6 of R-29 in an earlier draft? A. I don't believe so.

• • • • •

Q. Turning to item number 2 on page 7.

An element of management responsibility.

How do you price or value the element of managerial responsibility, sir? A. There is no formula.

Q. Can you price it, sir? A. It is an ingredient in the overall estimate of what profit should be derived from a transaction.

Q. Whose profit are you looking to in that transaction, [29844] in that sentence, sir? A. The buyer of the bulk offering.

Q. So I take it, then, he is valuing his own managerial responsibility? A. It is a decision as to what opportunities to take, how to spend his time.

Q. So that in that paragraph 2, when you referred to the entrepreneurial role of an owner, for the purpose of this testimony here, you are referring to the wholesaler now? A. That is correct.

Q. Again, in the second sentence of that same paragraph, which starts:

"An owner must supervise:", you are in this paragraph referring to the wholesaler? A. Well, actually, the whole pricing process is a business of thinking through what a willing buyer and a willing seller will do together so that the seller and the buyer go through the same kind of psychology.

One trying to analyze the other's approach and vice versa.

So that I don't think in this case or in the previous case, where we were zeroing in on this, we have anything

but semantics. Since I didn't say owners and buyers here, obviously I was thinking of one or the other, but the [29845] psychology applies both ways.

Q. But you were thinking in this paragraph of the wholesaler, were you not? A. That is correct.

Q. When you say a willing seller and a willing buyer, I take it at least for purposes of this paragraph, you mean a willing wholesale buyer? A. Yes, but again, in determining what price a seller can get, he has to think of what price a buyer will pay.

Q. Does he have to think of what a retail buyer will pay as compared to what a wholesale buyer will pay? A. Well, there are various hierarchies of wholesalers and retailers depending on the size tract you are talking about.

If, for instance, for some reason or another, the Navajos were to think of selling their 16 million acres in a bulk sale and they found a bulk purchaser, as they could today, there would be a first sale from that wholesaler to wholesalers. Then there would be hierarchies of wholesalers. There might be hierarchies of wholesalers until you finally got down to a wholesaler who would sell to people who would actually use as retailers.

Q. And they would, in turn, I take it, be comparing the price they would receive from that hierarchy to what they [29846] could do with the property selling it acre by individual acre? A. Right. Or tract by tract, depending upon the size of the transaction.

Q. When you testify as to such large scale tracts, I take it you have in mind one contiguous bulk piece of land? A. Not always, no.

Q. What did you have in mind in this testimony, sir? A. Well, I actually don't know whether the land is contiguous or not. I assume it must be but I imagine, as a

matter of fact, that there could be parcels that would not be contiguous here.

There have been many sales of groupings of property that were not contiguous, not even in the same community.

Q. And you would still consder them under your category of a bulk sale? A. If it is made as a bulk sale, yes.

Q. By that, you mean if it is all sold to the same buyer? A. Yes.

Q. Now, on page—on paragraph number 3 on page 7, you describe risk— "Risks of unforeseen developments which frustrate marketing plans or depress values".

I take it you will agree that there are risks of unforeseen developments which in turn will aid marketing plans [29847] or enhance values? A. Of course.

Q. And in fact, one of the items that you list in the last sentence in that paragraph, zoning changes—sometimes can be a favorable zoning change to a holder of property? A. Yes, but the process always starts with the best appraisal of the ultimate result and then you work down from there in calculating your profit percentage.

Q. Is there any element in your paragraph 3 which involves an appreciation of land just by reason of the shortage of the land area? A. There is none and this is not commonly part of the fair market value. The fair market value is at an instant in time and as I suggested earlier, everybody always hopes that he has made a bargain purchase.

Q. So you mean here—but you mean something different, do you not, Mr. Simon, when you say fair market value to a wholesale buyer and fair market value at retail? A. It is true as each buyer comes into the act and buys, he uses his appraisals, his reasonable expectations, and he tucks his hopes off to the side. He doesn't capitalize those.

Q. Then it is just, I take it, that different types of [29848] buyers appraise using different standards depending on their own business, is that correct? A. Could you amplify it a little bit? I am not sure I understood the question.

Mr. Pollack: I will withdraw the question and clarify it.

Exam. Clerman: All right.

Q. And I take it different types of buyers, such as a wholesale buyer as opposed to a retail buyer, use different kinds of calculations for appraising the property? A. Well, no, I don't think so. Again, the buyer and the seller have to put each other in the other's psychology for them ever to get together and also I think we are making a mistake here, and it may have been my fault.

There is no such thing as a wholesaler in this context of what we are talking about today, and a retailer. What we are talking about is a breaking up of the large land mass and, as I suggested in talking about the Navajos, there may be whole successions of wholesalers before you get to the final user.

Q. Let's assume for the moment that we are talking only about one wholesaler and presumably many retail purchasers from that wholesaler.

That, I take it, is what really you had in mind through- [29849] out most of your previous testimony here? A. No. In discussing the principle—shall we take a hundred acres and make a subdivision, is that your idea, or what is your suggestion?

Q. I am not making any suggestions. I am just asking if in R-29, your basic posture and the basis of your testimony consists of an assumption of one wholesaler and many

retail purchasers from that one whoesaler? A. Yes. And then after that probably more retail purchasers. I don't know. It depends on the size of the individual tracts we are talking about and I am not familiar with those.

Q. I take it in paragraph 4, on page 7, when you refer to the margin of profit as you use it in that paragraph only, you are referring to the profit on the resale of the property by a wholesaler, is that correct? A. Just one second.

Yes, that's right. A return on equity or profit is something that the buyer has to have or he won't act and the seller has to recognize the buyer will want or he won't find one, and the 15 per cent profit margin that I have used—

Mr. Pollack: I would like to strike that comment because there is no such item in R-29, sir.

Exam. Clerman: What do you mean by your 15 per cent [29850] profit?

The Witness: Well, the thing is, I was dealing initially with a 6 per cent factor, which is just ridiculous as applied to the real estate business and a 15 per cent profit is a very minimal profit in this kind of an enterprise, very minimal.

Certainly the groups that are buying apartment houses and office buildings today expect to get their money back in a couple of years, two years, three years, because of the tax benefits that they get through the excess of depreciation over amortization.

The other thing about that kind of a transaction is that it offers a capital gain opportunity when the project is resold. Land development doesn't have that potential generally because most land develop-

ment becomes a regular income situation rather than a capital gain situation.

So 6 per cent is absolutely out of this world, and I have used in my thinking 15 per cent as a very low minimum.

• • • • •

[29851] • • •

Q. When you say in paragraph 4 on page 7, fair market value, then, that term to you includes a margin of profit, is that correct? A. I didn't get back the words but they are the words that are used in real estate, a willing buyer and a willing seller.

The buyer has to have the margin of profit. The seller recognizes the buyer's need.

Exam. Clerman: Do you understand the question, sir?

The Witness: I thought it was the same thing all over again.

• • • • •

A. Margin of profit for the buyer, yes. The seller's profit is an irrelevancy.

Q. Did you prepare the table that appears on page 9 of your testimony, sir—I'm sorry, as Exhibit A? [29852] A. No, I did not.

Mr. Pollack: I move to strike the table that appears in Exhibit A.

• • • • •

[29853] Did you instruct anyone in the preparation of that table?

The Witness: Oh, certainly.

Excerpts From Transcript

Q. Who did you instruct? A. Counsel. No. I never do this arithmetic myself. I ask somebody who is better at arithmetic.

Q. In this case you asked counsel? A. To have an accountant do it.

Q. You gave your instructions as to the preparation of this chart to counsel? A. Yes.

Exam. Clerman: Do you know whose intelligence this computation represents?

The Witness: No, sir.

Exam. Clerman: Did you see it before it came into this hearing room?

The Witness: Yes.

Exam. Clerman: Does it reflect your views?

The Witness: It certainly does, except that I am not responsible for the actual arithmetic, but I assume it is correct. It's been checked.

Exam. Clerman: What are you responsible for?

The Witness: I am responsible for the concept and for the way it was prepared.

[29854] Exam. Clerman: Is this your concept?

The Witness: Yes.

Exam. Clerman: Motion denied.

Q. You said in referring to the chart on—which is Schedule A, that you are responsible for the arithmetic. I understand that.

Were you responsible or did you ever see any of the figures that are in that chart prior to the preparation of this chart? A. The figure that I am responsible for is 9 per cent. And the method of preparing the chart. The 103 million, which is the only other figure which is needed to run the whole chart out was given to me.

Q. Then is it your assumption that 103 million dollar figure is the only other figure you need to run this whole chart out in a mechanical way? A. If you say that monthly isn't a figure, but that is all. Six years, excuse me.

Q. Aren't there assumptions in this chart— A. Yes excuse me. I am entirely wrong. This entire proceeds received has to be given and the six years has to be given.

Q. And those were given to you? A. That's right.

[29855] Q. And you had not seen those figures prior to the preparation of this chart? A. That is correct.

Q. In its final form? A. That's right.

Q. Did you see the chart prior to the time your testimony was mailed out? A. I saw it before it was added to the testimony for mailing, yes.

Q. I take it in preparing your testimony, that you had in mind primarily general principles to be applied to any particular problem which you consider to be a "bulk sale problem"; is that correct? A. Yes.

Q. And it is not your testimony one way or the other whether that—those principles that you enunciate here would be or should be applied to any situation involving the New Haven Railroad? A. I am not familiar with this kind of transaction so I don't know what is applicable.

But I will say that 9 per cent is the prime rate on this kind of a loan in today's market and that right at the very moment, I am hoping to get 9 per cent. I don't know whether I will or not, on something that represents a very [29856] low percentage of loan to total market value.

And these rates can run up as high as 20 per cent and more. 9 is the prime rate. There is no such thing as 6 per cent.

Q. For a mortgage? A. That is correct.

Q. And that is what your 9 per cent refers to here, is interest on a mortgage? A. This was an exercise to run

9 per cent out on 100 per cent. It was not considered a mortgage. It was just an exercise.

If you will read in the testimony earlier, you will see that in addition to the financing charges, I suggested and believed that the entrepreneur is entitled to profit for risk and effort. This doesn't reflect that.

Q. In your testimony here the 9 per cent refers to the going rate of interest on large mortgages on undeveloped land? A. That is correct.

Mr. Pollack: I have no further questions.

By Mr. Bader:

Q. Mr. Simon, you state at the foot of page 4, I am advised—I'm sorry—let me—do you find that paragraph that begins at the foot of page 4 with a reference to the Interstate Commerce Commission and continues [29857] over to page 5? A. Yes.

Q. The next sentence, "I am advised that the figures for net proceeds for each year of the marketing period have been merely discounted to present worth at 6 per cent."

Do you find that statement? A. Yes.

Q. Did you write that sentence? A. No. But I undoubtedly am responsible for the "merely".

• • • • •

Q. Am I correct in understanding the word "advise" refers to advice by counsel? A. Yes.

[29857] Q. Did counsel show you the testimony of Mr. Hull in this proceeding? The proceeding before the Interstate Commerce Commission back in 1967? A. Let me say that—

Excerpts From Transcript

Exam. Clerman: Well, did counsel show you the testimony?

The Witness: I don't know one piece of testimony from another.

Exam. Clerman: I think that answers the question.

Q. Do you recall seeing this, sir, NHI 92, the prepared statement of Norman J. Hull, Jr.? A. That doesn't mean anything to me. I will say this, though, that during the break, I was told that I had figures flashed before me. I said to counsel, "Was I correct in saying that I hadn't seen any of the stuff," and counsel said to me, "I did flash the figures on one exhibit before you."

Q. Do you know what exhibit was that? A. No, I do not.

Q. Do you know whether you saw this NHI 92 before this meeting? A. No.

Q. Do you recall seeing it? A. I don't know.

[29859] Q. Do you recall whether counsel showed you the testimony of John R. White, NHI 94? A. All I know is that counsel tells me and I now recollect I saw one page of figures. I don't know where they are or who prepared them and that is where the 103 million was recorded.

Q. Will you confirm for me, sir, that the testimony of John R. White does not consist simply of one page of figures? A. It does not consist of that and I did not see it.

Q. Will you confirm for me, sir, that NHI 92, the testimony of Norman J. Hull, does not consist of one page of figures? A. I confirm it and I did not see that.

Q. Did you know that this was the testimony that was put in before the Interstate Commerce Commission on what ought to be done to compute a discount? A. No.

Q. Did you know what factors were enumerated by those witnesses when they testified before the ICC as to what

the discount rate should be? A. I was advised there was a 6 per cent figure being used.

Q. Did you know that Mr. Hull had suggested a different given in a given certain basis for that statement?

[29860] Mr. Perkins: I think the witness has indicated that he has not read any of this testimony.

Mr. Bader: I am trying to find out what he knew.

A. All I knew is that there was a 6 per cent figure. I did not know there was any other figure.

Q. Did you know what the evidence was before the ICC as to discounting when they accepted the figure of 6 percent? A. No.

Q. How do you know, then, that it was merely discounting the present worth at 6 per cent? A. I was advised that.

Q. Do you know what factors were taken into account or were before the ICC as to the ingredients of a discount rate, sir? A. No.

Q. Do you know whether uncertainty as to the precise time period for marketing the real estate was taken into account when the ICC reached a 6 per cent rate, sir? A. No.

Q. Do you know whether or not defects of title were taken into account in the evaluation of the properties? A. I can't conceive that any of these were because the figure is much too low to start with.

Q. Suppose, sir, they were taken into account in the [29861] valuation of the profits to which the rate was applied.

Wouldn't that be an appropriate or at least an acceptable means of allowing for these possibilities? A. I wouldn't think so. I would not think so.

* * * * *

Suppose that in valuing property, sir, one reduced the value of the property in view of defects in title, would one then be required to take into account defects in title in determining the appropriate discount rate?

Mr. Perkins: Mr. Examiner, the question can't be answered without counsel saying whether he is talking about [29862] known defects of title which the appraiser knew about or unknown defects of title which the appraiser didn't know about.

I request that the question be framed to indicate whether he is referring to known defects of title to which the appraiser—of which the appraiser was aware, and, therefore, took into account.

Exam. Clerman: The question should be clarified.

Q. Let's have it either way. Let's talk about first known defects of title. A. That is reflected in the appraisal. It doesn't relate to financing costs or real estate taxes or any of the other costs of the wholesaler.

Q. Wouldn't it be legitimate, as a method of analysis, Mr. Simon, to use a higher discount rate and not deduct for the known defects of title? A. Well, I think you used the word legitimate and it would certainly be very sloppy. It would not be the way to do it. I don't know exactly what legitimate means in the context.

Q. You don't know what was done in this case either, do you? A. No, I do not, sir.

Q. When you, as a bulk purchaser buy property, Mr. Simon, [29863] do you ordinarily know what it will sell for at retail by the final seller? A. No.

Q. You don't approach a deal that way, do you? A. There are two stages to the way I operate and mine is certainly not the only way of doing it.

If I encounter a bulk sale that has such an enormously low price for one reason or another in my opinion, that I don't feel it is necessary to make all of the calculations of ultimate profit, then I will go ahead on a bulk purchase without having any of the knowns.

Now, this is not the most conservative way to do but there is intuition and feel. The better way to do and some people are that patient is only to deal in bulk sale when you can get an option on the land.

This is difficult to get and you miss many opportunities if you insist on doing it in the proper way, and that is the proper way.

So you get an option on the land and then you prepare engineering studies and cash flows, which shows the ultimate profit that you can reasonably expect to make, and this, of course, does include an estimate or appraisal of what each piece of land will sell for.

Q. I think you testified before, in answer to a question by [29864] Mr. Pollack, Mr. Simon, that there was a whole hierarchy of retailers and wholesalers in this kind of a transaction depending upon how big a bulk you had to sell, is that right? A. There might be. Could be.

Q. When you were looking at a deal, would you be looking at the price that you would sell to the wholesalers at who would buy from you, or would you be looking at the price that some ultimate user would pay some retailer way down the line for some smaller segment? A. If I have a general plan in mind, is what I am going to do, I concentrate on my customers, but at the time of analyzing what that customer is likely to pay, I have to take into consideration what he is going to do with the land in turn.

Q. Do you know at what level the appraisals that we are talking about here were made, whether they were made at

ultimate retail to user or at some level of wholesalers? A. No, I don't. I imagine maybe some of both, but I actually don't know.

Mr. Bader: I move to strike everything beginning with "I imagine."

Exam. Clerman: Motion to strike granted. "I imagine" and following will be stricken.

[29865] Q. Do you know how much acreage is involved in this New Haven transaction? A. No, I don't.

Q. Do you have any idea? A. None.

Q. Do you know where the acreage is? A. I imagine it is along the New Haven Railroad.

Q. Do you know where—do you know what percentage of it is in Massachusetts or Connecticut? A. No, I don't.

Q. It doesn't make any difference to you? A. No, it doesn't.

Q. You said that there was a right way and a wrong way to buy property, and one of them involved taking an option, you said that was the right way. A. That is the more conservative way.

Q. What would one having such an option know about the price at which the sale would ultimately be made by the retailer to the ultimate user? A. The purpose in taking the option is to do the studying that is necessary to be able to end up with cash flow projections.

Q. That isn't the question I asked you.

I said what would he know, after taking the option [29866] ultimately about the sales price from the ultimate retailer to the user? A. If this were a bulk sale to wholesalers, he might not know very much about that, but he would have his estimate of all of the dollars he would receive for the sale of all of his land.

Q. And that is the difference that he would be applying his calculations to, isn't it? That is the income to him— A. The difference between the bulk sale and the sale to his customers, yes.

Q. Out of which he would make all of these calculations about cost of money and so forth, is that right? A. Yes.

Q. What would he know at that point of what it would cost the potential seller to hold the property and sell it off himself as a retailer? A. Well, he would know the whole picture. He would just substitute all of his figures presuming that he thought they were correct—he would substitute the present owner for himself as buyer and—I'm sorry—am I responsive to your question?

Q. Yes, sir.

What was your major in college, Mr. Simon? [29867] A. History and Literature of England. They had a special combo called History and Literature, and I took it, of England.

Q. When you say that someone gets the discounted value to present worth— A. What page is that?

Q. No, I am talking about you as a generic concept. A. Will you repeat that?

Q. Let me try again.

You testify at the bottom of page 2 that something being further discounted by the factor reflecting present worth of receipts in the future.

Do you find that? A. Yes.

I think that perhaps I used that differently from you but what that means to me is the uncertainty.

Exam. Clerman: Mr. Bader referred to the last portion of the last sentence on page 2, if I am correct, but I don't recall that you asked a question about it.

Mr. Bader: I didn't.

Q. What are the elements, sir, that go to determine the present value of the dollar to be received in a year? A. That is not my field and I don't use that calculation in anything that I do in real estate, and I don't know of [29868] any other real estate operator who does.

Q. One of the factors is risk, isn't it?

Exam. Clerman: The witness has just stated that it is not his qualification.

Mr. Bader: He wrote it. Or at least he bought it. I am certain he didn't write it.

And further discounted by the factor reflecting present worth of receipts in the future.

If that's gibberish, I suppose we could substitute gibberish and I suppose we would be all right.

A. If you substitute the word "uncertainty."

Q. And you would then—and a further discount based on uncertainty; is that what that means? A. By the factor of reflecting the uncertainty of receipts in the future.

Q. Well, will you look at the bottom of page 5, the top of page 6, I thought you were suggesting there that uncertainty had to be taken care of in addition to discounting to present worth? Isn't that what you say at the bottom of page 5, the top of page 6? A. I think what I am saying is if the 6 per cent factor is unrealistic—

Q. It is too low, isn't that what you are saying? A. Certainly. 6 per cent doesn't relate to this particular [29869] business that we are discussing.

Exam. Clerman: 6 per cent factor for what?

Excerpts From Transcript

The Witness: I think our problem is that we are dealing in two different things.

You are dealing in a calculation which you call the present discount—discount for the present value.

I am dealing in calculations in interest on the mortgage and return on equity.

Exam. Clerman: Are you commenting at all on a discount factor to present worth?

The Witness: I am saying the discount factor which I interpreted to mean what I was saying at 6 per cent does not reflect what has to be reflected to take into consideration what is involved in a bulk sale of real estate, and the profit potential that the buyer would expect.

Exam. Clerman: What do you understand the 6 per cent discount factor that has to be used that you referred to include or to embrace?

The Witness: I think what I use it for and it is being used for are two different things.

Exam. Clerman: What do you understand it is being used for?

The Witness: The monies in 1970, 1971, 1972 are being discounted at 6 per cent and I don't know whether it is all [29870] the monies or some of the monies and that that is being used as a substitute for mortgage interest and return on equity.

Exam. Clerman: This is what you meant when you made the statement "merely 6 per cent" or words to that effect?

The Witness: That's right. All I know is that in the bulk sale of real estate, the factors are interest on borrowed money and yield on equity.

Those are the factors in the market place.

Exam. Clerman: There is no factor for reducing the future receipts to present worth?

The Witness: As a mechanical thing, no. It doesn't exist.

Q. That isn't what you say in your testimony, though, is it, sir? A. I think so, if you read it the way I suggested.

Q. Let's go back and let's read it.

Do you understand, sir, that the 103 million dollar figure that you were given, and the receipts that you show, or that are shown in the third column of your chart, are gross receipts? A. I understand that the 103 million was money received from customers.

Q. Gross of— [29871] A. Gross.

Q. Did you know they were gross of expenses? A. I don't know what they are gross of but I do know this—

Q. I'm sorry, did you know they were net of expenses? A. May I answer it this way, that—

Q. No, I would like you to answer it in my terms, sir.

Exam. Clerman: Counsel is entitled to an answer, sir.

It is a specific question that can be answered. Does the witness know?

Would you repeat the question, Mr. Reporter?

Mr. Bader: I will try again.

Q. Were you aware that that 103 million dollars was net of expenses? A. I was only aware of it in the context of the other figures given to me and I was not aware of it in and of itself as to exactly what it represented.

Q. Don't you state at the foot of page 2 that you must— the bulk sale price will be substantially below aggregate retail values projected less holding and disposition costs,

and the further discount for reflecting present worth of receipts in the future? A. Well, this is a semantical problem. I have explained to you what the mental process is.

[29872] Q. When you use the phrase or whoever wrote this, when they used the phrase "and further discounted by the factor reflecting present worth of receipts in the future"; didn't that mean the 6 per cent application? A. 6 per cent, as I say later, is totally inadequate.

Q. I understand that, sir, but you say now that you apply a different process to the undiscounted values, isn't that right? A. That's right. I apply 15 per cent to equity which includes a factor of 6 per cent for the uncertainties.

Q. The 15 per cent includes 6 per cent? A. That's right.

In other words, it is 9 per cent plus 6 per cent which is the minimum that I can see for uncertainties in managerial anguish and all the rest of it. And this, as I said earlier, is a very, very low figure.

* * * * *

[29873] Q. You said, according to my notes, in answer to a question by Examiner Clerman, 9 per cent does not include discount to present worth.

That applies to equity not the borrowing portion of the deal. A. Yes.

Q. What is the borrowing portion of this deal as you understand it, Mr. Simon? A. All of my thinking and I have been looking through my statement, and if you will give me the benefit of the doubt, I think you will understand it has been geared to what a willing buyer would pay in the market place.

And the willing buyer looks at how much he can borrow and the remaining amount that he can't borrow is what is going to be his equity.

Excerpts From Transcript

And so what I am talking about proffered on page 7 and I am talking about the discount on page 2, these are two of the items which will raise the equity portion higher—the return or yield on the equity portion higher than the return on borrowed money.

Q. Which is the equity, how much is the equity portion? A. I had assumed to look at this thing in its most optimistic light from the seller's point of view, a 75 per cent loan at 9 per cent. I have the calculation and that is the [29874] thing we were talking about earlier.

Q. You didn't set that assumption out anywhere in your testimony in R-29, did you? A. I didn't name the numbers, but I think if you read it carefully—the language isn't as great as it may be, but you read it carefully, you will see I am talking about it.

Q. I will find 75 per cent in there? A. No, but you will find the profit has to include these factors that I mentioned.

You will not find the amount of borrowing and the amount of equity, no, but I assumed that—I think anybody who is conversant with the real estate business would make that as an assumption. It should have been made more explicit.

Q. It is not there at all, is it, in words or numbers, or anything else? A. No, you are absolutely right. It was a basic assumption.

Q. Now, let's assume, then, for the sake of argument, that you are talking about 75 per cent of this deal is borrowed.

What do you apply to that borrowed, 9 per cent? A. Yes. This is what I am trying to get now and I am dealing with less than 75 per cent for myself.

Q. As to the 25 per cent that is not borrowed, you are [29875] entitled to what on that? A. What I have set is a minimum of 15.

• • • • •

Q. Have you been approached by the New Haven to act as liquidator for the New Haven, sir? A. No, I have not. But—

[29876] Q. Do you have any reason to believe that this is the way the New Haven would choose to liquidate should they have to? A. Let me say if they are going to choose to make a bulk sale of land, the numbers that I have been giving are the best numbers in my opinion that would be obtainable from a giant corporation.

Mr. Bader: I move to strike. The answer is not responsive.

I move to strike—I ask that the question be—I ask the witness be directed to answer my question.

Exam. Clerman: Read the question, please.

(Question read by the reporter.)

Exam. Clerman: The answer is not responsive in my opinion.

Do you understand the question, sir?

A. Well, "the way" I would assume relates to—let's ask for a clarification.

What did you mean by "the way"?

Q. By selling the land to you, sir? A. To me personally?

Q. Yes, sir.

Mr. Perkins: Again, we have a question—this witness is not possibly qualified to testify what the New Haven will do.

[29877] Exam. Clerman: Objection is sustained. I think we are straying.

Q. So the process that you have described, sir, you would apply, as I understand it, to the gross receipts projected, is that right? A. We had a lot of descriptions.

Would you go over what—which process?

Q. The process of reducing by various percentages that you are here to sponsor and are here sponsoring would be applied to the projected gross receipts, is that right? A. I honestly don't make any sense out of the question at all. I don't know what—I honestly don't know what you mean.

Exam. Clerman: The witness must understand the question before he can answer.

Mr. Bader: I agree.

Q. The 9 per cent rate with respect to the hypothetical mortgage. The 15 per cent rate with respect to the hypothetical equity that you have developed. The amount that is to be applied to is the total gross receipts, is that right? A. No. No. No. No.

If you want to look at this, it is very simple.

Q. I don't want to look at that, so forget about it. [29878] A. So the answer is—of course not. It is applied to totally different numbers.

Q. Have you figured out what numbers it is applied—had you figured out what numbers it would be applied to in the actual facts of this case prior to the time that R-29 was circulated? A. No, sir.

Q. Is there any indication of what actual numbers that should be applied to in R-29? A. No, sir. I shall say I have not done it.

Q. You refer at page 3 to certain assumptions that you made.

I think they are continued on 4.

Excerpts From Transcript

Do you know or did you know when you prepared—when R-29 was circulated, how much this property for sale in the fifth and sixth year had been written down?

• • • • •

A. Oh, no, I didn't understand the question, not at all.

Q. With respect to the assumption six on page 4, do you know what the rental income of this real estate is? A. No, sir.

[29879] Q. Other than your belief that 6 per cent is ridiculously low or a synonymous variance of that phrase, do you have any basis—strike that question.

Do you know whether or not the 6 per cent rate fixed by the Commission is intended to contain a factor for the use of the money required to buy the property?

Mr. Perkins: Mr. Examiner, we are getting repetitious. The witness explained he used a totally different approach. He explained that he has not read the ICC decision or the testimony, and to ask him now whether he knows whether the 6 per cent was supposed to cover something is both repetitious and beyond the scope of the cross-examination as delineated by the responses which have been given heretofore.

Mr. Bader: This witness at page 5 states, after talking about merely discounting to present worth, his description of what the ICC does, then he skips down two lines and I take it, continuing his criticism of the ICC says: In any computation designed to reach a figure for fair market value"—and I will skip—"there must be a factor for the use of the money required to buy the property."

It seems to me perfectly proper to ask the witness whether the ICC intended to put in a factor for the

use of [29880] the money required to buy the property.

Exam. Clerman: Proper, yes. Repetitious, yes.

The question whether in connection with that sentence or not, I believe, has been asked and I believe this is repetitious.

Q. That factor that is referred to in that sentence that we just read, Mr. Simon, can that be quantified through a discount rate?

Exam. Clerman: That is the sentence beginning "In any computation" on page 5?

Mr. Bader: Yes, sir.

A. It is not done. That is not the way real estate is appraised by buyers and sellers and I am not enough of a higher mathematician to know whether it can be or not. I just don't know.

I would think not because—well, I don't know.

Q. Suppose the Commission had come up with a 25 per cent rate in its decision instead of a 6 per cent rate, would you make the comment that is set forth in that paragraph at the top of page 5? A. I wouldn't have used the word "merely".

Q. Would you have assumed that the Commission had not included a factor for the use of the money required to buy the property? [29881] A. If 25 per cent related to the entire proceeds, then I would not make such an assumption.

Q. So the basis for that assumption is the fact that the rate was 6 per cent, isn't it? A. What is bothering me is, yes, but also it is the wrong way to go about the calculation.

Q. What about these factors at the foot—listed at 6 and 7.

Is the only basis you have for believing they have not been taken into account is that you happen to think the rate is too low, isn't that right?

Mr. Perkins: Mr. Examiner, again I must object that, A, the witness—this is repetitious, and B, that the witness has outlined and has been cross-examined on his approach to quantification which was different from that used by the ICC.

I don't see any point in going further and asking him whether he knows what was in the ICC-6 per cent.

Mr. Bader: I didn't ask him that.

• • • • •

[29882] • • •

Mr. Perkins: Mr. Examiner, I would like to make one second objection:

I don't know where the witness has stated the premise of the question that they haven't been taken into account.

Mr. Bader: "Other factors which are not reflected in the discounting of future net proceeds at six per cent include the following."

It is the last two lines at page 5 of the testimony you wrote, Mr. Perkins.

Exam. Clerman: Do you recall the question, sir? You may answer.

A. It's a sufficient factor.

Q. It's the only factor you have; isn't it? A. It's the only factor I have.

Mr. Bader: I have no further questions.

I now move to strike this witness' testimony on the ground that this is not in any sense a new theory of valuation; it is in its entire framework simply a criticism of the rate adopted by the Commission of six per cent and that that is not before this Commission or before this Examiner on this reopened hearing.

Mr. Perkins: I oppose the motion on the grounds that a fair reading of the testimony and the testimony that [29883] the witness has given is that he approaches it on a new pricing theory which is wholly different from that of merely discounting future net proceeds and that is not what he does at all and that he assumes a bulk sale purchaser with a loan and then assumes a bulk sale purchaser with the objective of making some profit and that he does not discount at all the future net proceeds so the two theories are totally and completely different.

And I submit that we have the right to contend for this pricing theory in our brief.

Exam. Clerman: Motion to strike is denied.

* * * * *

By Mr. Schreiber:

Q. Mr. Simon, on page 3 of your testimony, you make the assumption, Number 2, "that such land has been carefully appraised by reliable real estate appraisers."

Do you mean by that that these appraisers have appraised the fair market value of the land? A. Well, I just meant what it said.

I assume that there has been an appraisal and that it was made by reliable appraisers.

It is the "reliable" carefully that I was assuming, [29884] because that's often a problem.

Q. What did you understand they were appraising if not fair market value? A. I was dealing with some given figures and asked to enunciate principles of the relationship of bulk sale and retail sale at the next level down in the hierarchy.

Mr. Schreiber: I move to strike that answer as not responsive.

This is his own assumption. I am asking what he meant by the assumption.

Exam. Clerman: I think that question can be answered. Motion to strike is granted.

The material is stricken.

The Witness: Would you repeat the question?

Q. My questic is whether in assumption 2 on page 3 you were saying that you assumed that the fair market value of the land had been carefully appraised by reliable real estate appraisers? A. Sure, yes.

Q. Now, turning to page 7 of your testimony, the last paragraph.

Are you there saying that that appraised market value is not the value of the land unless the factor is deducted reflecting a margin of profit to a prospective [29885] buyer? A. And a lot of other things.

Certainly what was appraised according to my information was the value at retail.

Q. You make no such distinction in your assumption on page 2, do you? A. No, I don't.

Q. And you didn't know when the testimony was prepared for you; you don't know whether these sales were at

retail or appraised at retail or whole; did you, sir? A. No, that is not correct.

When I participated in making up the testimony, was given a certain number of figures. I was given a sales price to the customers of the bulk seller and his expenses and some of the expenses that I was given are expenses like selling expenses and brokerage commissions and I was not given another figure which might have been an appraisal of the bulk sale value.

I was not given that.

Q. What basis have you for saying that the fair market value carefully appraised by reliable real estate appraisers is not what it is supposed to be, fair market value? [29886] A. Well, we are talking about two different things. One, we are talking about an appraisal of what a hundred, five hundred, a thousand, I don't know how many buyers were postulated here, but a great number of buyers were postulated and the appraisal, as I understand it, was made on what they would pay for the respective chunks of land.

That has nothing whatever to do—that's not correct—that is only part of the calculation that you have to make if you want to find out what a single buyer would pay for the whole ball of wax.

Q. You assume that the only sale of this property will be to one user? A. We are not talking today about users but we have been assuming a bulk sale and we have been discussing about the decision which is in the railroad's hands as to whether or not to go through the retail processes themselves or whether to make a bulk sale.

Q. Well, what basis have you for saying that the railroad will do one thing rather than the other?

Mr. Perkins: This is repetitious and outside the scope.

Excerpts From Transcript

We have already, I believe, had a ruling that questions as to what the railroad will actually do, if there is in fact a liquidation, is beyond the scope of this [29887] witness' testimony.

Exam. Clerman: Objection sustained.

Mr. Schreiber: I have no further questions, Mr. Examiner.

Exam. Clerman: Thank you, sir.

I don't know whether the witness has answered exactly this but on page 2, sir, in the last paragraph, where you refer to a price substantially below the amounts which the owner might expect, and so on, do you have any specific percentage or could you elaborate on what you mean by "substantial"?

The Witness: No, the only way I know of to arrive at that is to go through the calculation that the length of time that the project is going to be a project, until the last piece of land is sold, figure yield during that period at what you consider to be a reasonable figure for you and figure the other expenses.

So that, again, time is one of the most important single factors but there are other factors that vary.

Exam. Clerman: You couldn't get a range, for example, as to what you mean by substantial?

The Witness: This is going to give you an idea, although it's a little bit confused, perhaps.

[29888] But the land purchase of the acreage at Reston was a bulk sale in the neighborhood of 12 and a half million dollars, and the ultimate retail price and value of everything that was going to take place there was a billion dollars estimated.

This was a project expected to be completed and it looks now as though it will be in 20 to 25 years.

Excerpts From Transcript

Exam. Clerman: Was that representative in your experience of the relationship which you just outlined between the bulk and the retail—

The Witness: It's representative of that particular phenomenon that is called a new town.

I have seen a few calculations in cash flow made by others in the field.

At the other extreme is a project which I am embarked on now in Putnam Valley where the price of the land is 350 an acre and where I will be a wholesaler and selling to builders who will be buying from me and building houses and after the input of roads and amenities, I am guessing now because I don't have my engineering studies, but my guess is the range per acre will go—

Exam. Clerman: You don't know, then?

The Witness: No.

[29889] Exam. Clerman: This is not an accomplished fact?

The Witness: No.

Exam. Clerman: Thank you very much.

The witness is excused.

• • • • •

Letter from the Commission's Chairman to the Reorganization Court, dated June 10, 1969

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

OFFICE OF THE CHAIRMAN

June 10, 1969

Honorable Robert P. Anderson
United States Circuit Judge
United States Court of Appeals
Hartford, Connecticut

Re: In the Matter of the New York, New Haven and Hartford R.R. Co., Debtor, No. 30226 (D. Conn.)

Dear Judge Anderson:

In your Memorandum of Decision of May 28, 1969, you asked the Commission to recompute the discount to present value of New Haven's liquidation proceeds to take into account changes in valuation items made in our Fourth Supplemental Report (334 I.C.C. 25) and additional items referred to in your Memorandum. We have assumed that in requesting a recomputation that it is your intention to obtain a figure for your information; accordingly we gladly submit our recomputation without waiving or prejudicing the right of any party to appeal from your Memorandum.

In the Second Supplemental Report (331 I.C.C. 643), we found the gross proceeds from a liquidation of the New Haven would be $197.9 million, and discounted the proceeds to present value. The amount of the discount, based upon the evidence of the Trustees, was $17.6 million. We did not consider the effect of a reduction of $6.2 million in our valuation of the New Haven properties from the Trustees' valuation, nor the effect of 1966 depreciation of $3 million.

Letter from the Commission's Chairman to the Reorganization Court, dated June 10, 1969

In the Fourth Supplemental Report, we carried over the above reduction and the depreciation adjustment, and in addition revalued New Haven's interest in the Boston and Providence. These changes, and the ones referred to in your Memorandum of Decision, would result in a net decrease in the proceeds of $3.5 million. This net decrease would consist of the following items (in millions):

(a) New Haven's interest in B&P:		
Increase (334 I.C.C. 52-53)	$2.6	
Decrease (Memorandum, pp. 31-32)	1.5	
		$1.1 (Increase)
(b) Value of road and equipment		6.2 (Decrease)
(c) Depreciation for year 1966		3.0 (Decrease)
(d) Harlem River and Oak Point Yards		4.6 (Increase)
Total decrease in proceeds		$3.5

Of this $3.5 million decrease in gross proceeds, the estate would experience a decrease of $3.3 million in the first year of liquidation. Consequently, the effect of these items on the discount to present worth would be very slight. Based on the computation attached hereto, the discount to present worth would be reduced by only $130,000 if all the foregoing items were fully taken into account.

This letter and its conclusions have been approved by vote of the entire Commission.

Sincerely,

VIRGINIA MAE BROWN
Chairman

cc: Counsel for all parties of record in No. 30226

Letter from the Commission's Chairman to the Reorganization Court, dated June 10, 1969

Hon. Robert P. Anderson
June 10, 1969

Attachment

Adjustment of Discount to Present Value
(In Millions)

Items Affecting Liquidation Proceeds:	*1st Year*	*2nd Year*	*3rd Year*	*Total Change*
(a) New Haven's interest in B&P	+ $1.1			+ $1.1
(b) Value of Property:				
Equipment	— 3.5			— 3.5
Road Property[1]	— 0.9	— $0.9	— $0.9	— 2.7
	— 4.4	— 0.9	— 0.9	— 6.2
(c) Depreciation for 1966:				
Equipment	— 2.3			— 2.3
Road Property[1]	— 0.3	— 0.2	— 0.2	— 0.7
	— 2.6	— 0.2	— 0.2	— 3.0
(d) Harlem River and Oak Point Yards[2]	+ 2.6	+ 1.2	+ 0.8	+ 4.6
Net Change in Proceeds	— $3.3	+ $0.1	— $0.3	— $3.5
Discount at Annual Rate of 6 Per Cent:				
Discount Factors	.02913	.08486	.13739	
Amount of Discount	— $0.10	+ $0.01	— $0.04	— $0.13

[1] The distribution of proceeds from the sale of road property is shown in Exhibits R-37 and R-39.

[2] The valuation of parcels 1A through 1E in Exhibit NHI-51 would be increased from $10.32 million to $13 million, and the difference is spread over three years in accordance with the marketing schedule set forth in the exhibit. In addition, the valuation of parcels 3A and 3B would be increased from $7.77 million to $9.65 million and the difference is reflected in the first year as shown in the same exhibit.

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

June 17, 1969

Honorable Robert P. Anderson
United States Circuit Judge
United States Court of Appeals
New Haven, Connecticut

Re: *In the Matter of the New York, New Haven and Hartford R.R. Co., Debtor, No. 30226 (D. Conn.)*

Dear Judge Anderson:

In conformity with the direction set forth in your Memorandum of Decision, dated May 28, 1969, we make the following comments on the letter of the Interstate Commerce Commission, dated June 10, 1969, in response to your Honor's direction that the Commission file "a new formulation and computation of the discount for the present value of the New Haven's liquidation proceeds, in accordance with generally recognized accounting principles and based upon the changes made in valuation items through and including those stated in the present opinion". (Memorandum, p. 32).

The Commission's letter has erroneously interpreted the Court's decision to mean that the *only* defect in the Commission's previous treatment of the discounts to present value lay in its failure to consider the effect of the successive reductions and increases in liquidation value determined in the Second and Fourth Supplemental Reports and the Court's decision on the amount of the

discount to present value. We are unable to read the Court's decision in so limited a fashion.

—2—

The Court's decision did not ask merely for a recomputation which took into account only the successive changes in valuation, but asked for "a new formulation and computation . . . in accordance with generally recognized accounting principles *and* based upon the changes made in valuation items through and including those stated in the present opinion" (Memorandum, p. 32; emphasis added).

A new formulation based upon recognized accounting principles requires:

(a) that the gross proceeds be restated and corrected to avoid errors other than those which result solely from additions, to, and subtractions from, liquidation value reflected in prior Commission reports and the Court's decision; the evidence of Penn Central and the Bondholders agrees on the total amount of receipts to be discounted; the Commission used a different and incorrect figure; and

(b) that the Commission's decision that the proceeds from the sale of Investments and Equipment will be received in the first year (see Attachment to Commission letter to the Court, Items (a), (b) and (c) "1st year") be likewise reflected in the discount of liquidation proceeds to present value. The evidence of Penn Central and the Bondholders both reflected the fact that a discount was appropriate, but differed as to time. The Commission failed to apply its own decision as to time of the receipts from the sale of Investments and Equipment.

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

—3—

A. *The Commission's inclusion in gross receipts to be discounted of $8,177,633 which is never to be received.*

The Court will recall that at the Remand hearings, the Bondholders had presented testimony of Dr. Altman (R-39) who computed the discounts to present value based upon the testimony of the Trustees' witnesses and the initial testimony of Penn Central's witness Hull (NHI-93), as to the time when the New Haven would receive various of the proceeds of liquidation. The testimony of Penn Central's Mr. Hull was based upon the testimony of the Trustees' witnesses, with modifications based upon new assumptions of his own. The testimony of both Altman and Hull recognized that the Commission had erred by ignoring the testimony of the Trustees' witnesses as to the time of receipt. In addition, *both Altman and Hull recognized that it was necessary to exclude $8,177,633 from the gross value of the estate* because this amount was written off the land values on the assumption of a six-year liquidation period. (See Memorandum, p. 20).

How the Error Occurred.

In its Inclusion Report, the Commission relied for its discount figure for receipts upon the testimony of Mr. Gordon, which included the $8,177,633 of write-down of land values as a receipt; Mr. Gordon also treated the same amount as a liquidation expense but never computed the discount for expenses. Thereafter, this Court and the Three-Judge Court found that the Commission in its In-

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

clusion Report had failed to discount the liquidation expenses and thus had failed to compute the discounts to

—4—

present value correctly. As a result of the opinions, the Bondholders and Penn Central presented testimony on the Remand as to the correct amount of the discount with respect to both receipts and expenses. Since the $8,177,633 was never actually to be received and then expended, the computations of *both* witnesses with respect to the discount for liquidation expenses avoided treating the $8,177,633 as an expense of liquidation; they also took out the $8,177,633 in computing (and discounting) receipts. The Commission adopted the testimony on remand on the discounts of expenses, but held to Mr. Gordon's discount of receipts. As a result, the Commission has discounted the *receipts* as if the $8,177,633 were to be received (according to Mr. Gordon) but discounted the *expenses* without including the $8,177,633 which Mr. Gordon had included among the expenses (contrary to Mr. Gordon).

While it may be correct to treat the $8,177,633 both as a receipt and then as an expense, as Mr. Gordon did or treat the $8,177,633 as never having been received and therefore neither a receipt nor an expense, as Dr. Altman and Mr. Hull did, it cannot be correct to treat the $8,177,633 as having been received, but not expended, which is the effect of the Commission's decision. Although the Commission has taken a discount on the $8,177,633 of "phantom receipts", it has *never* taken a discount on the $8,177,633 which would have to be treated as a liquidation expense during the fifth and sixth years, when the "write-downs" from land value become actual.

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

—5—

The Commission's letter of June 10, 1969, completely ignores the forgoing and it thus perpetuates the error of overstating the discount of net proceeds to present value by $2,066,488 ($8,177,633 x .25270, the discount factor for the fifth year, the time Mr. Gordon used).

B. *The Commission's failure to correct the discount to present value by eliminating from the gross receipts $17,591,589 to take into account salvage costs of "Other Road Property".*

Despite the fact that both Penn Central (R-38, Schedule A) and the Bondholders (R-39, as modified by Tr. 29747-49) essentially agree on the point, the Commission's letter fails to correct the discount to present value by eliminating from gross receipts $17,591,589. This amount will be received and expended at about the same time, since it is made up of specific road property salvage costs *not* included in the list of liquidation expenses discounted by the Commission.* Since the Commission has not included the $17,591,589 of salvage costs as an expense of liquidation, it may not include this amount as a receipt.

---

* Penn Central's exhibit R-38, Schedule A, shows net receipts from "Other Road Property" of $36,239,600 ($38,879,600 reduced by $2,640,000 to reflect an adjustment required by the Inclusion Report) because it netted certain expenses of tearing up road property against gross receipts from the sale of the salvaged material. This is the same technique Mr. Gordon used in arriving at gross liquidation value in NHI-42. Mr. Gordon computed his discount on gross receipts of $56,471,189 for "Other Road Property", an excess of $17,591,589 over the comparable figure of $38,879,600.

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

One example of the items which together comprise the $17,591,589 may be found in the treatment of the liquidation of the railroad ties. Mr. Gordon valued the ties at $1.75 and $2.00 per tie and considered the expense of removing the ties at $1.00 per tie (NHI-42, p. 32). The Commission and Mr. Gordon have computed the discount from liquidation value on the basis of the $1.75 and $2.00 receipts, but have failed to discount the $1.00 of salvage expense. Both Penn Central and the Bondholders recognized that these salvage costs had to be reflected, which they did by reducing the amount of receipts before the discount (according to Altman and Hull). Alternatively the same result could have been achieved by including the amount in receipts and also including the amount in the liquidation expenses. The Commission has included the amount in receipts but not included the amount in computing the discount of liquidation expenses.

All of the items going to make up the $17,598,589 may be found in the valuation of road properties other than land (NHI-42, p. 12, id. p. 32).

The Commission's error results in an overstatement of the discount to present value in the amount of $1,474,057.*

---

*

	Overstatement	*Discount Factor*	*Overstatement of Discount*
1st year	$ 5,863,863	.02913	$ 170,814
2nd year	5,863,863	.08486	497,607
3rd year	5,863,863	.13739	805,636
	$17,591,589		$1,474,057

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

(C) *Timing error in favor of Penn Central.*

A further error, overstating the discount by $118,000, resulted from the fact that the Commission and Mr. Gordon treated $1,837,000 of real estate sale proceeds as receivable over a period of 6 years, when the undisputed testimony was that the land was "readily saleable" and would be disposed of at that price in one to one and one-half years (Tr. 23535-37).

(D) *Timing error in favor of the New Haven.*

The uncorrected errors discussed above are errors in favor of Penn Central. The Commission also made an error in favor of the Bondholders which amounts to $1,372,646.

Both Mr. Gordon and the Commission failed to apply any discount to $47,121,400 representing receipts from equipment, i.e., rolling stock, and certain investments. Presumably, Mr. Gordon and the Commission considered that these assets could be disposed of so readily that no discount was needed. Properly, they should have been treated as disposable in the first year of liquidation* and discounted

* The $47,121,400 is made up of Equipment ($22,651,800), Investments ($20,388,800), Materials and Supplies ($2,083,200) and Account 741 Assets ($1,997,600). Mr. Gordon testified that the first year is appropriate for equipment NHI-42, p. 40. As noted above, the Commission, in the Attachment to its letter dated June 10, 1969, decided that receipts from sales of equipment and investments would take place in the first year.

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

accordingly. Both the Bondholders and Penn Central
—8—
recognized that some discount was appropriate. Dr. Altman treated the discount on the basis of the proceeds of these items being received in the first year and Mr. Hull assumed the receipts would be in the first three years,*

Since the Commission and Mr. Gordon took *no* discount because they anticipated prompt disposition, the Bondholders' concession that a discount should be taken on the assumption of receipts in the first year, should govern.** The amount of that discount is $1,372,646 ($47,121,400 x .02913).

* * * * *

The Commission, by failing to follow this Court's direction to reformulate and recalculate on the basis of "generally accepted accounting principles", has perpetuated its errors in the matter of the discount to present value by a total of $3,650,545 in favor of Penn Central and $1,372,646 in favor of the New Haven, for a net error in favor of Penn Central of $2,285,899 before considering changes in the discount which result from changes in valuation in the Court's opinion of May 28, 1969, and the Commission's Second and Fourth Supplemental Reports.

—9—

The Bondholders agree that the Commission's limited calculations were correct as far as they went and demon-

---

* Except for $200,000 of the Account 741 assets to be received in the 6th year.

** Mr. Hull's first discount study (NHI-93) treated these receipts as first year receipts.

Letter From Counsel to the First Mortgage Bondholders to the Reorganization Court, dated June 17, 1969, Responding to Letter From the Commission Chairman, dated June 10, 1969

strate that a further net reduction of $130,000 is required to account for the changes in valuation resulting from the Court's decision and the Commission's Reports.

Penn Central must therefore pay to the New Haven on account of the corrections of the discount to present value the amount of $2,415,899.

Respectfully,

MIGDAL, LOW, TENNEY & GLASS,
Attorneys for New Haven Bondholders Committee

By /s/ LESTER C. MIGDAL—A partner

SIMPSON, THACHER & BARTLETT,
Attorneys for Manufacturers Hanover Trust Company, as Trustee under the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad

By /s/ HORACE J. MCAFEE
/s/ MYRON S. ISAACS

MYRON S. ISAACS,
Attorney for Oscar Gruss & Son

KEY:

NEW HAVEN HARLEM DIVISION LINE	BLUE
PENN CENTRAL INTERCHANGE TRACK WITH NEW HAVEN (R-27,pp.2-3)	RED
PENN CENTRAL FORMER PORT MORRIS BRANCH LINE (R-27,p2;T29403-02)	YELLOW
NEW YORK CITY'S SPUR TRACK TO HUNTS POINT TERMINAL MARKET	BROWN
PENN CENTRAL HARLEM BRANCH LINE	ORANGE
PENN CENTRAL HUDSON DIVISION LINE	GREEN

HARLEM RIVER

SOUND VIEW PARK

BRONX RIVER

HUNTS POINT TERMINAL MARKET

OAK POINT FREIGHT YARD
(See NH-52,NH-95 and NH-115 for other maps)

Penn Central ownership ends (R-27, p.3; T. 29408)

Former Port Morris Yard (R-27, pp.4-5, T.29430-33)

EAST RIVER